

SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 313

JESSE ELLIOTT DOUGLAS, PETITIONER,

vs.

ALABAMA.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE
STATE OF ALABAMA

PETITION FOR CERTIORARI FILED JULY 22, 1964
CERTIORARI GRANTED OCTOBER 12, 1964

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1964

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[fol. 1]

1

**IN THE CIRCUIT COURT OF DALLAS COUNTY
STATE OF ALABAMA**

At a Regular Session of the Circuit Court of Dallas County, Alabama, at Which the Officers Authorized by Law to Hold or Serve Such Court Were Serving, the Following Proceedings Were Had in the Cause Styled:

**THE STATE OF ALABAMA, Plaintiff,
No. 9392 vs.
JESSE ELLIOTT DOUGLAS, Defendant.**

INDICTMENT—Filed January 23, 1962

January Term, 1962

The Grand Jury of said County charge, that before the finding of this indictment, Jesse Elliott Douglas whose name is unknown to the Grand Jury other than as stated, unlawfully and with malice aforethought, did assault Charles Warren with the intent to murder him against the peace and dignity of the State of Alabama.

Blanchard L. McLeod, Solicitor Fourth Judicial Circuit.

No. 9392; The State of Alabama vs. Jesse Elliott Douglas;
Charge: A to M—Assault With Intent to Commit a Felony;
No Prosecutor; State Witnesses:

A True Bill

Warren A. Dundon, Foreman Grand Jury.

Grand Jury No. 23

Filed in open Court, this 23rd day of January, 1962 in the presence of the Grand Jury.

M. H. Houston, Clerk

Upon the arrest of Defendant let him be admitted to bail on giving bond in the sum of Ten Thousand \$10,000.00 Dollars with security to be approved by the Sheriff.

This 29 day of Jan., 1962.

James A. Hare, Judge Presiding.

[fol. 2]

IN THE CIRCUIT COURT OF DALLAS COUNTY
STATE OF ALABAMA

MOTION FOR CONTINUANCE

Comes the defendant, Jesse E. Douglas, and moves that the above case set for trial Tuesday, February 27, 1962, and as ground for said motion or shows unto this Court as follows:

1. That the following witnesses are not available for the defense of the defendant in this Court due to the fact that they are defendants in a trial in process in the Circuit Court of Jefferson County, Alabama:

Dean Bradley	501 N. 4th St.	Gads-en, Ala.
R. G. Beason	General Delivery	Steele, Ala.
Stanley Lloyd	614 Glendridge Road	E. Gads-en, Ala.
E. S. Smith	Rt. # 2	Albertville, Ala.
Arthur Brown	309 33rd. St.	Alabama City, Ala.
Dewey Eller	Rt. # 1.	Attalla, Ala.
Otis Glasco	1850 Airport Blvd.	E. Gads-en, Ala.
M. L. Benefield	305 College St.	Albertville, Ala.
H. Slaton	1105 Stillman Ave.	E. Gads-en, Ala.
J. D. Williams	654 Noojin St.	Attalla, Ala.
Grady Collier	128 Brentwood Drive	Gads-en, Ala.

The said witnesses are necessary and material witnesses, without whose testimony the defendant cannot safely proceed to trial; and no other evidence is at hand, or witnesses known to him, whose testimony can be relied upon to prove particular facts that the defendant expects to prove by such absent witnesses above named, to maintain the issue in respect thereto on his part.

That said witnesses are character witnesses and witnesses of such type as can tend to prove an alibi for the defendant at the time the crime, with which the defendant is charged, was committed.

That due to character of the testimony expected to be produced by witnesses it would be impossible to produce the same result by making a stipulation with the prosecution as to what their testimony would produce.

2. That the venire which has been drawn for the trial of this case has been subjected to numerous new-paper reports, radio news broadcast & television programs, detailing the evidence which has been produced on a companion case which has this date been submitted to jury which is still out, and has not rendered a verdict.

The attached exhibits, A, B, C, & D, which are news-paper clippings reveal minute details of matters, which are not matters ordinarily revealed to a jury, and materials which are illegal evidence for jury, are now fresh on the minds of the members of the venire, and it would be impossible to strike a fair and unbias jury, who had no knowledge of the evidence in this case, from that venire.

[fol. 3] Jesse E. Douglas, Defendant.

Sam Earl Esco, Jr., Attorney-at-Law, Selma, Alabama.

SEE/LM

Duly sworn to by Jesse E. Douglas, jurat omitted in printing.

I hereby acknowledge that I personally received a copy of the foregoing motion on this the 1st day of March, 1962.

Blanchard L. McLeod

[fol. 4]

IN THE CIRCUIT COURT OF DALLAS COUNTY
STATE OF ALABAMA

MOTION TO QUASH

Now comes the defendant in the above style and numbered cause and moves the court to quash the indictment returned by the Grand Jury of Dallas County, Alabama on the 23rd day of February 1962 against Jesse Elliott Douglas, and to strike said indictment from the files of this court, on the following grounds:

1. That the Grand Jury, by which said indictment was found, did not have sufficient legal evidence before it upon which to find said indictment.
2. That said Grand Jury did not have before it any legal evidence tending to establish the corpus delicti of the offense charged in the indictment.
3. The Grand Jury returning the indictment did not have competent witnesses or legal documentary evidence before it upon which to base an indictment and was therefore without authority to find an indictment.
4. The Grand Jury had no legal evidence before it upon which to predicate an indictment against this defendant.
5. The indictment returned by the Grand Jury in this case was based solely upon an alleged confession of guilt which was extorted and illegally obtained from an alleged accomplice by and through force and violence or threats of force and violence, coercion, torture, and brutality by officers and investigators of Dallas County, Alabama, and the State of Alabama while acting in their official capacity and by the use of said illegal document he was deprived of due process and equal protection of law guaranteed by the Constitution and laws of Alabama and the 14th Amendment to the Constitution of the United States, that prior to the return of the indictment the defendant was arrested without warrant on January 19, 1962, was never taken before

a Magistrate, but was held in the County jail of Dallas County Alabama and was denied bail.

6. That the alleged accomplice from whom said illegal confession was obtained was held incommunico without being permitted to confer with counsel, his wife, or friends, until after he had been subjected to days of constant questioning by officers of the Sheriff's Department of Dallas County Alabama, State of Alabama investigators and F.B.I. agents, and subjected to violence, or threats of violence, coercion and force, or threats of force, an alleged confession was distorted from him, which is the sole basis of said indictment, and he was thereby deprived of his rights to due process and equal protection guaranteed by the Constitution and laws of Alabama and the 14th Amendment to the Constitution of the United States.

Jesse E. Douglas, Defendant.

Sam Earl Esco, Jr., Attorney-at-Law, Selma, Alabama.

SEE/LM

[fol. 5] *Duly sworn to by Jesse E. Douglas, jurat omitted in printing.*

I hereby acknowledge that I personally received a copy of the foregoing motion on this the 1st day of March, 1962.

Blanchard L. McLeod.

[fol. 6]

IN THE CIRCUIT COURT OF DALLAS COUNTY

STATE OF ALABAMA

VERDICT AND JUDGMENT—March 3, 1962

Comes the State of Alabama, by its Solicitor, and also comes the Defendant, Jesse Elliott Douglas, in his own proper person and by and with his attorneys, and being duly and legally arraigned in open Court upon the indictment in this cause, for answer to said indictment, pleads and says that he is not guilty in manner and form as charged therein; and issue being joined:

Thereupon came a jury of good and lawful men, to-wit: Albert S. Champion and eleven others, who having been impanelled and duly sworn according to law, on their oaths say, "We, the Jury, find the Defendant guilty of assault with the intent to murder as charged in the indictment. Albert S. Champion, Foreman."

[fol. 7]

IN THE CIRCUIT COURT OF DALLAS COUNTY

STATE OF ALABAMA

Case No. 9392

THE STATE OF ALABAMA, Plaintiff,

versus

JESSE ELLIOTT DOUGLAS, Defendant.

SENTENCE—March 3, 1962

Directly the Court completed the poll of the jury, the defendant, Jesse Elliott Douglas, was called before the Court in the presence of his counsel and the following proceedings were had:

The Court: Do you have anything to say why the judgment of the Court should not be pronounced against you at this time?

The Defendant: No, sir.

The Court: According to the verdict of the jury finding you guilty of assault with intent to murder, as charged in the indictment, you are accordingly adjudged to be guilty of assault with intent to murder as charged in the indictment, and as punishment for said offense you are sentenced to the penitentiary of Alabama for a period of twenty years.

The Court: Is there notice of appeal?

Mr. Esco: Yes, sir.

The Court: The Court will set your appeal bond at \$50,000.00.

The undersigned, James A. Hare, as Presiding Judge in the trial of the above styled cause in the Fourth Judicial Circuit of Alabama, does hereby certify that the proceedings above recited are true and correct as to sentence pronounced on the defendant, Jesse Elliott Douglas, in the Circuit Court of Dallas County, Selma, Alabama, on the 3rd day of March, 1962.

James A. Hare, Presiding Judge.

[fol. 8]

IN THE CIRCUIT COURT OF DALLAS COUNTY
STATE OF ALABAMA

GIVEN CHARGES

1. I charge you, that where an assault committed by means calculated to produce death, but death does not ensue, the state must prove the defendants criminal intent beyond a reasonable doubt, in order for the act to constitute a felony.

Endorsed: "Given, Hare, Judge."

2. I charge you, to authorize a conviction for assault with intent to murder, evidence must show an assault with an intent to take life.

Endorsed: "Given, Hare, Judge."

5. The Court charges the jury that expert testimony is not necessarily binding on the jury.

Endorsed: "Given, Hare, Judge."

6. The court charges the jury that testimony given by an expert witness as his opinion is not the controlling effect, and the jury is not absolutely required to accept opinions of experts in the place of its own judgment.

Endorsed: "Given, Hare, Judge."

8. The Court charges the jury that the fact the Grand Jury has returned an indictment against the defendant cannot be judged by the jury as evidence of defendant's guilt.

Endorsed: "Given, Hare, Judge."

12. The Court charges the jury that the presumption of innocence is a shield and a protection to the defendant which attends him throughout the trial, and until the jury is convinced beyond all reasonable doubt by the evidence in the case that the defendant is guilty.

Endorsed: "Given, Hare, Judge."

14. I charge you, if there is a reasonable doubt as to whether the shooting was done with malice, the defendant can not be convicted of assault with intent to murder.

Endorsed: "Given, Hare, Judge."

15. Gentlemen of the Jury, I charge you that the question of the Defendant's guilt or innocence of the charge of "Assault With Intent to Murder", or, is guilty of the lesser charge of "Assault" is solely for you to decide.

Endorsed: "Given, Hare, Judge."

19. I charge you, that the jury are the sole and exclusive judges of the evidence in this case, and should determine the issues of this case in the light of the evidence submitted and under the law as given you by the court.

Endorsed: "Given, Hare, Judge."

20. I charge you, a single reasonable doubt of the defendant's guilt arising out of the evidence in this case, after considering all the evidence, is sufficient for the acquittal of the defendant, and it is for the jury to say under all the evidence whether they entertain such doubt.

Endorsed: "Given, Hare, Judge."

[fol. 9] 21. The Court charges the jury that the indictment in this case is not to be considered by the jury as

evidence creating an inference of the defendant's guilt of any offense contained in the indictment.

Endorsed: "Given, Hare, Judge."

22. I charge you, that if you believe from the evidence in this case that there are any influences outside of the representatives of the State of Alabama, seeking to bring about a conviction of the defendant, from any motive other than the desire of the just enforcement of law, which influence has operated upon the evidence in this case, you are authorized to take this fact into consideration in determining whether or not the evidence offered by the State is trustworthy and entitled to be believed.

Endorsed: "Given, Hare, Judge."

23. I charge you, Gentlemen of the jury, that you are not authorized to infer malice from the character of the weapon used, without regard to other circumstances.

Endorsed: "Given, Hare, Judge."

25. I charge you, gentlemen of the jury, that a reasonable doubt is that state of the case which after the entire comparison of all the evidence, leaves the minds of the jury in that condition that they cannot say that they have an abiding conviction to a moral certainty of the truth of the charge.

Endorsed: "Given, Hare, Judge."

26. I charge you, gentlemen of the jury, the opinions of the experts are not controlling, and it is for the jury to determine the weight and sufficiency of such testimony.

Endorsed: "Given, Hare, Judge."

29. The Court charges the jury that a reasonable doubt may spring from the lack or the absence of evidence, or may spring from the evidence itself, and that if any reasonable doubt as to the defendant's guilt arising out of the lack of the evidence, or the evidence itself, exists in the

minds of the jury, or any single member of the jury, the jury should not return a verdict convicting the defendant.

Endorsed: "Given, Hare, Judge."

32. The Court charges the jury that while it is the duty of each member of the jury to confer with and consider with each and every other member of the jury the facts and circumstances in this case, there is no duty on the part of any member of the jury to sacrifice his own conviction in order to agree with other members of the jury as to the verdict which shall be rendered.

Endorsed: "Given, Hare, Judge."

33. The Court charges the jury that the defendant, by his plea of not guilty, has denied each and every material allegation of fact set out in the indictment and has thereby cast the burden of proof upon the State, requiring the State to produce evidence believed by the jury to be true, sufficient to convince the jury beyond all reasonable doubt that [fol. 10] the defendant is guilty as charged in the indictment.

Endorsed: "Given, Hare, Judge."

34. The Court charges the jury that the testimony in this case is to a large degree, circumstantial, and that the jury would not be authorized to convict the defendant upon circumstantial evidence until such evidence believed by the jury to be true is so strong, clear and convincing as to exclude every reasonable hypothesis consistent with the innocence of the defendant.

Endorsed: "Given, Hare, Judge."

35. I charge you, gentlemen of the jury, the opinion testimony of an expert witness is not of controlling effect, and a jury is not required to accept the opinion of experts in the place of its own judgment.

Endorsed: "Given, Hare, Judge."

36. I charge you, gentlemen of the jury, the weight given to the testimony of an expert is solely within the province of the jury.

Endorsed: "Given, Hare, Judge."

37. I charge you, gentlemen of the jury, you may treat an expert's testimony as you, the jury, see fit in connection with the facts and circumstances of this case.

Endorsed: "Given, Hare, Judge."

38. The Court charges the jury that you are not bound by the opinion of experts.

Endorsed: "Given, Hare, Judge."

39. I charge you, that no defendant can be convicted of any crime from any inference, except such inference arises out of the testimony offered in the case.

Endorsed: "Given, Hare, Judge."

40. I charge you, that the law does not authorize you to convict the defendant merely because you think he is guilty of crime. You must believe beyond a reasonable doubt and to a moral certainty that he did commit the act with which he is charged.

Endorsed: "Given, Hare, Judge."

42. The Court charges the jury that the law places the burden upon the State to convince the jury beyond all reasonable doubt that the defendant is guilty, and if the evidence introduced fails to convince each individual member of the jury beyond all reasonable doubt that the defendant is guilty, the jury would not be authorized to return a verdict against the defendant convicting him of any offense.

Endorsed: "Given, Hare, Judge."

43. The Court charges the jury that the fact that there is an indictment in this case is not to be considered by the jury as evidence adverse to the defendant.

Endorsed: "Given, Hare, Judge."

44. The Court charges the jury that if the jury believe that any witness has testified falsely as to any material fact, the jury is authorized in the exercise of its discretion to reject the whole, or any part, of the testimony of that witness.

[fol. 11] Endorsed: "Given, Hare, Judge."

45. The Court charges the jury that unless the jury is convinced by the evidence beyond a reasonable doubt and to a moral certainty of the defendant's guilt, they should not convict the defendant.

Endorsed: "Given, Hare, Judge."

46. I Charge you, to authorize a conviction for assault with intent to murder, evidence must show an assault with an intent to take life.

Endorsed: "Given, Hare, Judge."

47. The Court charges the jury that each and every member of the jury must be convinced by the evidence and beyond all reasonable doubt, that the defendant is guilty before the jury would be authorized to convict the defendant of any charge in the indictment.

Endorsed: "Given, Hare, Judge."

48. I charge you, gentlemen of the jury, that the defendant is presumed to be innocent until the State by the evidence in this case convinces you beyond all reasonable doubt that he is guilty.

Endorsed: "Given, Hare, Judge."

49. I charge you, that there is no duty resting on defendant to disprove his guilt, nor to offer evidence to disprove his guilt, the burden rests upon the State to offer to the jury satisfactory and convincing evidence sufficient to establish the guilt of the defendant in every material element, beyond all reasonable doubt.

Endorsed: "Given, Hare, Judge."

50. The Court charges the jury that the humane provision of the law is that every one charged with crime is presumed to be innocent, and this is a fact in the case, which must be considered with all the evidence, and should not be disregarded. This presumption goes with the defendant as a shield for his protection throughout the entire trial until the State removes it by offering evidence of such character as to establish his guilt to a moral certainty.

Endorsed: "Given, Hare, Judge."

51. The Court charges you, gentlemen of the jury, that the law enjoins upon you the imperative duty of giving the defendant the benefit of every reasonable doubt arising from the evidence before you should convict him of any offense embraced in the indictment.

Endorsed: "Given, Hare, Judge."

52. The Court charges the jury that a person charged with a felony should not be convicted of a felony unless the offense excludes to a moral certainty every reasonable inclusion but that of guilt; no matter how strong the circumstances are they do not come up to the full measure of proof which the law required, if they can be reasonably conciled with the theory that the defendant is innocent.

Endorsed: "Given, Hare, Judge."

[¹⁹ 12] 53. The Court charges the jury that the only foundation for a verdict of guilty in this case is that the ¹⁹ ¹² shall believe from the evidence and beyond a reasonable doubt and to a moral certainty, that the defendant is ¹⁹ as charged in the indictment to the exclusion of every hypothesis consistent with his innocence and every reasonable doubt of his guilt, and if the prosecution has failed to furnish such measure of proof and to so convince the minds of the jury of his guilt, you should find him not guilty.

Endorsed: "Given, Hare, Judge."

4. The burden is upon the State, and it is the duty of State, to prove by the evidence beyond all reasonable

doubt and to the exclusion of every other reasonable hypothesis, every circumstance necessary to show that the defendant is guilty; and, unless the state has done that in this case, it is your duty, gentlemen of the jury, to render a verdict of not guilty.

Endorsed: "Given, Hare, Judge."

55. I charge you, gentlemen of the jury, you may treat testimony of experts as it deems best in connection with facts and circumstances of the case, and the judgments of experts or inferences of skilled witnesses, even when unanimous and uncontroverted are not necessarily conclusive on the jury.

Endorsed: "Given, Hare, Judge."

56. I charge you, gentlemen of the jury, that the defendant is presumed to be innocent of all of the charges embraced in the indictment, and the burden is on the state to prove him guilty by the evidence believed by you to be true, and beyond all reasonable doubt, and after you have considered the entire evidence in this case, if there be a reasonable doubt of the guilt of the defendant arising out of that evidence, or the lack of evidence then it would be your duty to acquit him.

Endorsed: "Given, Hare, Judge."

57. The Court charges the jury that presumption of innocence attends this defendant through-t the trial and stays with him until the State brings evidence believed by the jury to be true, so strong and convincing that the jury is convinced beyond all reasonable doubt by such evidence that the defendant is guilty.

Endorsed: "Given, Hare, Judge."

58. I charge you, that if the means chosen for an assault are not adapted to the end, it furnishes a strong, but not conclusive inference there was no intent to kill.

Endorsed: "Given, Hare, Judge."

60. The Court charges the jury that if any individual member of the jury is not convinced of the guilt of the defendant beyond a reasonable doubt and to a moral certainty, the jury should not convict the defendant.

Endorsed: "Given, Hare, Judge."

62. I charge you, gentlemen of the jury, that you are not bound by the opinion of experts or by the apparent weight of evidence, but you may give your own conclusions.

[fol. 13] Endorsed: "Given, Hare, Judge."

64. The Court further charges the jury that they must give the accused the full benefit of all reasonable doubts, arising from any part of the evidence, taken in connection with the whole evidence.

Endorsed: "Given, Hare, Judge."

67. I charge you, gentlemen of the jury, that you would not be authorized to convict the defendant on mere suspicion, surmise or conjecture.

Endorsed: "Given, Hare, Judge."

69. I charge you, gentlemen of the jury, that the indictment in this case has no weight as evidence and should be given no consideration by the jury except that it is an accusation made by the Grand Jury against the defendant, charging him with the offense embraced in the indictment and is a means provided by law whereby a man accused of offenses against the criminal law may be brought to trial; and the defendant, if indicted by the Grand Jury, is presumed to be innocent of such offense embraced in the indictment found by the Grand Jury until every reasonable doubt of his guilt is removed from the mind of the jury by the evidence admitted in the case.

Endorsed: "Given, Hare, Judge."

70. I charge you, gentlemen of the jury, an accomplice is one who participates in the commission of an offense against the criminal law, or who aids or assists another

or others in the commission of such offense, or one who stands by and aids another in the commission of an offense against the criminal law by prearrangement with the person actually committing such offense, or through words or conduct encourages another in the commission of an offense against the criminal law; and no person accused of any felony can be convicted on the testimony of such an accomplice, unless his testimony is corroborated by other evidence tending to connect the defendant with the commission of the offense; and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, is not sufficient.

Endorsed: "Given, Hare, Judge."

71. I charge you, suspicion, conjecture and guesswork are not the proper methods of arriving at the guilt or innocence of the defendant on a criminal charge. The only method which the law recognizes as being sufficient to bring about the conviction of a defendant, is the production by the State of such clear, satisfactory and convincing evidence that the jury necessarily concludes from such evidence beyond all reasonable doubt, that the defendant is guilty as charged. No duty of any kind rests upon a jury to convict any defendant, unless the evidence offered meets the qualifications of convincing the jury beyond a reasonable doubt.

Endorsed: "Given, Hare, Judge."

[fol. 14]

IN THE CIRCUIT COURT OF DALLAS COUNTY

STATE OF ALABAMA

REFUSED CHARGES

3. I charge you, that if you have a reasonable doubt of the defendant's guilt, after considering evidence of the

defendant's previous good character, along with the other evidence in the case, you should acquit him.

Endorsed: "Refused, Hare, Judge."

7. I charge you, that good character alone, when considered with the other evidence, may be sufficient to generate a reasonable doubt of the defendant's guilt and authorize acquittal.

Endorsed: "Refused, Hare, Judge."

9. I charge you, that in order to convict the defendant on the charge of "assault with intent to murder", the same measure of proof is necessary as in case of murder, except that death need not be proved.

Endorsed: "Refused, Hare, Judge."

10. Gentlemen of the Jury, I charge you that if you have a reasonable doubt that the defendant fired the shot that injured Charles Warren, you should acquit the Defendant of the charge of Assault With Intent to Murder.

Endorsed: "Refused, Hare, Judge."

11. I charge you, the malice aforethought must be shown beyond a reasonable doubt.

Endorsed: "Refused, Hare, Judge."

13. I charge you, that if the evidence in this case has left your minds or the mind of any one juror in a state of doubt or uncertainty as to the guilt of the defendant as charged in the indictment, then you must acquit him.

Endorsed: "Refused, Hare, Judge."

16. Gentlemen of the Jury, I charge you that if you believe the States' witness, Charles Warren, was accidentally injured, you cannot find the Defendant guilty of "Assault With Intent to Murder".

Endorsed: "Refused, Hare, Judge."

17. I charge you, that to convict for assault to murder, it must be shown beyond reasonable doubt defendant intended with malice aforethought to kill, or aided in act.

Endorsed: "Refused, Hare, Judge."

18. I charge you, that if you have a reasonable doubt that the defendant did shoot at the witness, Charles Warren, with the intent to murder him, then you can not find him guilty of the charge of "assault with intent to murder".

Endorsed: "Refused, Hare, Judge."

24. I charge you, in order to convict of assault with intent to murder, the jury must be satisfied by all the evidence beyond a reasonable doubt, not only that the accused committed the assault, but that it was made by him with intent to murder the person assaulted.

[fol. 15] Endorsed: "Refused, Hare, Judge."

27. I charge you, that the jury may consider evidence of the defendant's good character along with the other evidence, and if such evidence raises a reasonable doubt of his guilt after fair consideration of all the evidence the jury should acquit the defendant.

Endorsed: "Refused, Hare, Judge."

The court charges the jury that if the jury is reasonably satisfied that the defendant was a man of good character at the time of the alleged commission of the offense charged against him, that fact may of itself be sufficient to generate a reasonable doubt as to the guilt of the defendant when otherwise the jury might have no doubt as to his guilt when taken in connection with all the other evidence in the case.

Endorsed: "Refused, Hare, Judge."

30. I charge you, gentlemen of the jury, that the defendant cannot be convicted of any felony on the testimony of any witness, unless corroborated by other substantial evi-

dence tending to connect the defendant with the commission of the offense; and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, is not sufficient.

Endorsed: "Refused, Hare, Judge."

31. I charge you, gentlemen of the jury, that the defendant cannot be convicted of any felony on the testimony of any witness, unless corroborated by other substantial evidence tending to connect the defendant with the commission of the offense; and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, is not sufficient.

Endorsed: "Refused, Hare, Judge."

41. The Court charges the jury that reasonable doubt in a given case growing out of the evidence or such reasonable doubt may spring from the absence from evidence.

Endorsed: "Refused, Hare, Judge."

I charge you, gentlemen of the jury, that if you believe the evidence in this case, you should acquit the defendant.

Endorsed: "Refused, Hare, Judge."

61. The Court charges the jury that the burden is upon the State to convince the jury beyond all reasonable doubt that the defendant is guilty and if after a fair consideration of all the evidence, any part of the evidence fails to convince each individual member of the jury beyond all reasonable doubt that the defendant is guilty, the jury would not be authorized to return a verdict against the defendant convicting him of any offense.

Endorsed: "Refused, Hare, Judge."

63. The Court charges the jury that evidence of the defendant's good character when offered in evidence in the trial of a homicide case, may, if believed by the jury, serve [fol. 16] to generate a reasonable doubt as to the guilt of defendant, when without such evidence of good character no reasonable doubt would exist.

Endorsed: "Refused, Hare, Judge."

65. I charge you, gentlemen of the jury, that if you believe the evidence in this case, you should not convict the defendant.

Endorsed: "Refused, Hare, Judge."

66. I charge you, the jury is instructed by the Court that proof of a single fact by a preponderance of the evidence inconsistent with the defendant's guilt when taken in connection with all the other evidence, justifies an acquittal of the defendant and in that event the jury must find the defendant not guilty.

Endorsed: "Refused, Hare, Judge."

68. The Court charges the jury that the presumption of law is that the defendant is innocent of the charges made by the indictment and this presumption goes with the defendant as a matter of evidence, to the benefit of which the accused is entitled, until every reasonable doubt of the defendant's guilt has been removed from the minds of the jury by the evidence in this case, and if the evidence of any witness, is insufficient to overcome this presumption unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and such corroborative evidence, if it merely shows the commission of the offense, or the circumstances thereof, is not sufficient.

Endorsed: "Refused, Hare, Judge."

[fol. 17]

IN THE CIRCUIT COURT OF DALLAS COUNTY

STATE OF ALABAMA

MOTION FOR NEW TRIAL

Now comes the defendant in the above styled cause and moves the court to set aside the verdict of the jury heretofore rendered and the judgment of the court rendered thereon in said cause, and to grant the defendant a new trial; and for grounds of said motion defendant assigns, separately and severally, the following, to-wit:

1. For that said verdict is contrary to the law of the case.
2. For that said verdict is contrary to the evidence in said case.
3. For that the verdict is not sustained by the great preponderance of the evidence.
4. For that said verdict is against the weight of the evidence in the case.
5. For that the verdict is not sustained by the weight of the evidence in said cause.
6. For that the verdict is contrary to the law and evidence in the case.
7. For that said verdict was procured through the partiality of the jury in favor of the state and against the defendant.
8. For that said verdict was procured through partiality of the jury in favor of the state and against the defendant, thereby depriving said defendant of a fair and impartial trial.
9. For that said verdict was procured by reason of the favoritism on the part of the jury in favor of the state and against the said defendant.
10. For that said verdict was procured by reason of the favoritism on the part of the jury in favor of the state and against the defendant, thereby depriving defendant of a fair and impartial trial.
11. For that said verdict was procured through the caprice of the jury..
12. For that said verdict was procured through the caprice of the jury, thereby depriving defendant of a fair and impartial trial.
13. For that no valid judgment has been rendered in this cause.

14. For that there has been no formal adjudication of guilt of the defendant; there has been no written entry of adjudication or judgment of guilt as required by law.
15. For that the defendant has not been sentenced as required by law.
16. For that there has been no written entry of the sentencing of the defendant as required by law.
17. For that the sentence imposed by the court orally is excessive.
18. For that the sentence imposed by the court is based on the failure of the defendant to testify in another case rather than on the demands of justice in his case.
19. For that the defendant has discovered new evidence material to his defense which he could not with reasonable diligence have discovered and produced at the trial.
20. For that the court erred in overruling the defendant's motion for a continuance made prior to this trial.
21. For that the court abused its discretion in overruling [fol. 18] the defendant's motion for a continuance.
22. For that the defendant was prevented from having a fair trial by the order of the court overruling the defendant's motion for a continuance.
23. For that the court erred in overruling the defendant's motion to quash the indictment.
24. For that the court abused its discretion in overruling the defendant's motion to quash the indictment.
25. For that the defendant was prevented from having a fair trial by the order of the court overruling the defendant's motion to quash the indictment.
26. For that the trial was illegal because based upon illegal evidence.
27. For that the court erred in overruling the defendant's motion for a mistrial.

28. For that the court abused its discretion in overruling the defendant's motion for a mistrial.

29. For that the defendant was prevented from having a fair trial by the court overruling the defendant's motion for a mistrial.

30. For that the court erred in refusing to give the jury the written charges submitted by the defendant.

31. For that the court erred in refusing to give the jury the written charge requested by the defendant as follows:

"I charge you, that good character alone, when considered with the other evidence, may be sufficient to generate a reasonable doubt of the defendant's guilt and authorize acquittal."

32. For that the court erred in refusing to give the jury the written charge requested by the defendant as follows:

"The court charges the jury that if the jury is reasonably satisfied that the defendant was a man of good character at the time of the alleged commission of the offense charged against him, that fact may of itself be sufficient to generate a reasonable doubt as to the guilt of the defendant when otherwise the jury might have no doubt as to his guilt when taken in connection with all the other evidence in the case."

33. For that the court erred in refusing to give the jury the written charge requested by the defendant as follows:

"The Court charges the jury that a reasonable doubt in a given case growing out of the evidence or such reasonable doubt may spring from the absence from evidence."

34. For that the court erred in refusing to give the jury the written charge requested by the defendant as follows:

"Gentlemen of the Jury, I charge you that if you believe the State's witness, Charles Warren, was accidentally injured, you cannot find the Defendant guilty of 'Assault With Intent to Murder'."

35. For that the court erred in refusing to give the jury the written charge requested by the defendant as follows:

"The Court charges the jury that the burden is upon the State to convince the jury beyond all reasonable doubt that the defendant is guilty and if after a fair consideration of all the evidence, any part of the evidence fails to convince each individual member of the jury beyond all reasonable doubt that the defendant is guilty, the jury would not be authorized to return a verdict against the defendant convicting him of any offense."

36. For that the court erred in refusing to give the jury [fol. 19] the written charge requested by the defendant as follows:

"I charge you, that if you have a reasonable doubt that the defendant did shoot at the witness, Charles Warren, with the intent to murder him, then you cannot find him guilty of the charge of 'assault with intent to murder'.

37. For that the court erred in refusing to give the jury the written charge requested by the defendant as follows:

"I charge you, gentlemen of the jury, that the defendant cannot be convicted of any felony on the testimony of any witness, unless corroborated by other substantial evidence tending to connect the defendant with the commission of the offense; and such corroborative evidence if it merely shows the commission of the offense or the circumstances thereof, is not sufficient."

38. For that the court erred in refusing to give the jury the written charge requested by the defendant as follows:

"The Court charges the jury that evidence of the defendant's good character when offered in evidence in the trial of a homicide case, may, if believed by the jury, serve to generate a reasonable doubt as to the guilt of defendant, when without such evidence of good character no reasonable doubt would exist."

39. For that the court erred in refusing to give the jury the written charge requested by the defendant as follows:

"I charge you, gentlemen of the jury, that if you believe the evidence in this case, you should not convict the defendant."

40. For that the court erred in refusing to give the jury the written charge requested by the defendant as follows:

"I charge you, that if you have a reasonable doubt of the defendant's guilt, after considering evidence of the defendant's previous good character, along with the other evidence in the case, you should acquit him."

41. For that the court erred in refusing to give the jury the written charge requested by the defendant as follows:

"I charge you, gentlemen of the jury, that if you believe the evidence in this case, you should acquit the defendant."

42. For that the court erred in refusing to give the jury the written charge requested by the defendant as follows:

"Gentlemen of the jury, I charge you that if you have a reasonable doubt that the defendant fired the shot that injured Charles Warren, you should acquit the defendant of the charge of Assault With Intent to Murder."

43. For that the court erred in refusing to give the jury the written charge requested by the defendant as follows:

"The court charges the jury that the presumption of law is that the defendant is innocent of the charges made by the indictment and this presumption goes with the defendant as a matter of evidence, to the benefit of which the accused is entitled, until every reasonable doubt of the defendant's guilt has been removed from the minds of the jury by the evidence in this case, and if the evidence of any witness is insufficient to overcome this presumption unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and such corroborative evidence, if it merely shows the commission of the offense, or the circumstances thereof, is not sufficient."

44. For that the court erred in refusing to give the jury the written charge requested by the defendant as follows:

"I charge you, the malice aforethought must be shown beyond a reasonable doubt."

45. For that the court erred in refusing to give the jury the written charge requested by the defendant as follows:

"I charge you, that the jury may consider evidence of the defendant's good character along with the other [fol. 20] evidence, and if such evidence raises a reasonable doubt of his guilt after fair consideration of all the evidence the jury should acquit the defendant."

46. For that the court erred in refusing to give the jury the written charge requested by the defendant as follows:

"I charge you, gentlemen of the jury, that the defendant cannot be convicted of any felony on the testimony of any witness, unless corroborated by other substantial evidence tending to connect the defendant with the commission of the offense; and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, is not sufficient."

47. For that the court erred in refusing to give the jury the written charge requested by the defendant as follows:

"I charge you, in order to convict of assault with intent to murder, the jury must be satisfied by all the evidence, beyond a reasonable doubt, not only that the accused committed the assault, but that it was made by him with intent to murder the person assaulted."

48. For that the court erred in refusing to give the jury the written charge requested by the defendant as follows:

"I charge you, that to convict for assault to murder, it must be shown beyond reasonable doubt defendant intended with malice aforethought to kill, or aided in act."

49. For that the court erred in refusing to give the jury the written charge requested by the defendant as follows:

"I charge you, that if the evidence in this case has left your minds or the mind of any one juror in a state of doubt or uncertainty as to the guilt of the defendant as charged in the indictment, then you must acquit him."

50. For that the court erred to the prejudice of the defendant in overruling objections of the defendant to testimony offered by the state.

51. For that the court erred to the prejudice of the defendant in overruling defendant's objections to evidence offered by the state.

52. For that the court erred to the prejudice of the defendant in sustaining the state's objections to testimony offered by the defendant.

53. For that the court erred to the prejudice of the defendant in sustaining the state's objections to evidence offered by the defendant.

54. For that the court erred in overruling the defendant's objections to the testimony of Charles Warren.

55. For that the court erred in overruling the defendant's objections to the testimony of Edward Gort.

56. For that the court erred in overruling the defendant's objections to the testimony of J. E. Williamson.

57. For that the court erred in overruling the defendant's objections to the testimony of Dr. William C. Smith.

58. For that the court erred in overruling the defendant's objections to the testimony of Aaron Teague.

59. For that the court erred in overruling the defendant's objections to the testimony of Major W. R. Jones.

60. For that the court erred in overruling the defendant's objections to the testimony of R. L. Fry.

- [fol. 21] 61. For that the court erred in overruling the defendant's objections to the testimony of Ralph H. Holmes.
62. For that the court erred in overruling the defendant's objections to the testimony of Robert B. Finley.
63. For that the court erred in overruling the defendant's objections to the testimony of L. C. Crocker.
64. For that the court erred in allowing in evidence the state's Exhibit #1.
65. For that the court erred in allowing in evidence the state's Exhibit #2.
66. For that the court erred in allowing in evidence the state's exhibits #3 thru #7 inclusive.
67. For that the court erred in allowing in evidence the state's Exhibit #8.
68. For that the court erred in allowing in evidence the state's Exhibit #9.
69. For that the court erred in allowing in evidence the state's Exhibit #10.
70. For that the court erred in allowing in evidence the state's Exhibit #11.
71. For that the court erred in allowing in evidence the state's Exhibits #12 thru #16 inclusive.
72. For that the court erred in allowing in evidence the state's Exhibit #18.
73. For that the court erred in allowing in evidence the state's Exhibit #19.
74. For that the court erred in allowing in evidence the state's Exhibit #20.
75. For that the court erred in allowing in evidence the state's Exhibit #21.
76. For that the court erred in allowing in evidence the state's Exhibit #22.

77. For that the court erred in allowing in evidence the state's Exhibit #23.
78. For that the court erred in allowing in evidence the state's Exhibit #24.
79. For that the court erred in allowing in evidence the state's Exhibit #25.
80. For that the court erred in allowing in evidence the state's Exhibit #26.
81. For that the court erred in allowing in evidence the state's Exhibit #27.
82. For that the court erred in allowing in evidence the state's Exhibits #28 thru #34 inclusive.
83. For that the court erred in overruling the defendant's motion to exclude the state's evidence.
84. For that the court erred in overruling the defendant's objections to the oral argument of the prosecuting attorney to the jury.
85. For that the defendant was prevented from having a fair trial by statements of the prosecuting attorney in his oral argument to the jury.
86. For that the court erred in repeating a part of his charge to the jury without repeating all of his charges.
87. For that the court erred in overruling the defendant's objection to the repetition by the court of a portion of its oral charge to the jury.
[fol. 22] 88. For that the defendant was prevented from having a fair trial by the court repeating part of his charge to the jury without repeating the entire charge.
89. For that the arrest of the defendant was illegal.
90. For that the defendant was arrested without a warrant.
91. For that the purported warrant for the arrest of the defendant was not issued until after his actual arrest.

92. For that the purported warrant for the arrest of the defendant was issued by M. H. Houston, ex officio clerk, Dallas County, Alabama, who is not a magistrate under the laws of the State of Alabama, Code of Alabama, Title 15, Sections 120 and 399.

93. For that the purported warrant under which the defendant was arrested was returnable to the Dallas County Court, which is not a court of record.

94. For that the arrest of the defendant violated his constitutional rights.

95. For that the defendant was subjected to an illegal search and seizure in violation of his constitutional rights.

96. For that the defendant was prevented from having a fair trial as a result of the bias and prejudice of the jury due to newspaper reports.

97. For that the defendant was prevented from having a fair trial by the bias and prejudice of the presiding judge.

98. For that the defendant's constitutional rights against self incrimination have been violated.

99. For that one of the jurors had a discussion with unauthorized persons during the deliberation of the jury.

100. For that there was misconduct on the part of the jury to the prejudice of the defendant.

101. For that there was misconduct on the part of the counsel representing the state to the prejudice of the defendant, and which misconduct thereby influenced the jury in rendering a verdict against the defendant.

102. For that there were statements made by the court, in the presence and hearing of the jury, to the prejudice of the defendant, and which influenced the jury in rendering a verdict against the defendant.

103. For that the court committed prejudicial error in allowing counsel for the state to make prejudicial remarks during the argument to the jury, which influenced the jury in rendering a verdict against the defendant.

104. For that the court erred in overruling the objection of the witness, Olen Ray Loyd, in taking the witness stand and offering any testimony in said case.

105. For that the following statement which was made by the court in the presence and hearing of the jury, was to the prejudice of the defendant and it influenced the jury in rendering a verdict against the defendant in this case:

[fol. 23] "Yes, sir. Mr. Loyd, the understanding of the Court is that the jury has already determined your guilt in the only case pending in this Court arising out of this alleged transaction, and that the benefits and prohibitions of the Fifth Amendment have no application to you and your testimony on this witness stand. You cannot enforce them successfully, and the Court instructs you that you are required and will be required to answer."

106. For that the court committed prejudicial error in requiring the witness, Olen Ray Loyd, to give any testimony in said case.

107. For that the court erred to the prejudice of the defendant in overruling defendant's objection to the following question propounded to the witness, Olen Ray Loyd, by the state:

"On the 18th day of January, 1962, were you arrested in Ohatchie, Alabama?"

108. For that the court erred in requiring the witness, Olen Ray Loyd, to answer the following question which was propounded to said witness by counsel for the state:

"On Saturday, January 20, 1962, were you in the Dallas County jail?"

109. For that the court erred to the prejudice of the defendant in compelling the witness, Olen Ray Loyd, to answer the following question which was propounded to said witness by counsel for the state:

"Do you remember talking to Mr. Robert Fry, the FBI agent, at that time?"

110. For that the court committed prejudicial error in making the following statement in the presence of the jury, which said statement influenced the jury in rendering a verdict in favor of the prosecution and against the defendant:

"I can't force the witness to answer. All I can do is to tell him that he is in contempt of this Court. That's all I can tell him."

111. For that the court committed prejudicial error in overruling the following motion which was made by counsel for the defendant:

"At this time I move that this witness (referring to Olen Ray Loyd) be excluded from the witness stand on the grounds that we have given notice of appeal in this case, that we are preparing a motion for a new trial; that he is privileged from constitutional law of the United States from testifying at this time and that he is claiming the right."

112. For that the court committed prejudicial error in declaring the witness, Olen Ray Loyd, in contempt of court in the presence of the jury, and that said prejudicial remarks by the said court influenced the jury in rendering a verdict against the defendant in this case.

113. For that the court committed prejudicial error in permitting any part of the alleged or purported confession or statement of Olen Ray Loyd to be read in the presence of the jury.

114. For that the defendant was prevented from having a fair trial as a result of the jury hearing the alleged confession of Olen Ray Loyd, which was heresay evidence as to the defendant in this case.

115. For that the court abused its discretion in allowing any part of the purported confession of Olen Ray Loyd to be read to the jury or in their presence.

116. For that the court erred in overruling defendant's objection to the following question:

[fol. 24] "I, Olen Ray Loyd, make the following statement of my own free will, voluntarily and without any threats or hope of regard to Ralph Holmes, whom I know to be a state investigator, Sheriff James G. Clark of Dallas County, Alabama." Did you make that statement and sign it?"

117. For that the court erred in overruling defendant's objection to the following question:

"I further ask you, didn't you say, 'I have been informed that I do not have to make any statement unless I desire to do so, that any statement I do make can be used against me in a court of law, and that I have the right to have the advice of an attorney before making any statement', did you make that statement."

118. For that the court erred in overruling defendant's objection to the following question:

"Did you further say, 'I am thirty-nine years of age and was born September 9, 1922, at Kenner, Alabama. I live at 742 Brookside Drive, Gadsden, Alabama. I was employed as a truck driver for Bowman Transportation Company in Gadsden, Alabama, until we went on strike on November 4, 1961.' Did you make that statement?"

119. For that the court erred in overruling defendant's objection to the following question:

"Did you further say, 'On January 17, 1962, I went to the union hall in East Gadsden and signed in to walk the picket line at Bowman Transportation Company. I walked until I was relieved by another boy at 4:45 that evening, who told me the police were at the union hall and wanted to talk to me. He took my place in the line and I went to the hall. When I arrived at the back door of the hall Mr. Fred Renegar met me and he said that he had a call from Birmingham for me to

make a 'trip'. He was, I think, referring to a trip where I would drive a truck as he said I would probably be glad to get a trip. He asked me if I would be willing to make a trip with Jesse Douglas and that we should report to the union hall in Birmingham, Alabama at 6:30 p.m. He asked me if I had to go home to tell my wife and I said that I would.' Did you make that statement?"

120. For that the court erred in overruling defendant's objection to the following question:

"Did you make the further statement, 'I left the hall and went to Cargo Standard Service Station in Gadsden and purchased six gallons of gas for my car on credit. I told Mr. Cargo that I had to go to Birmingham to make a trip and I would pay him when I returned. I left the station and went to my father-in-law's home in Campbell Court. His name is W. B. Morgan and I told him I had to make a trip and that I needed some money to eat on and I borrowed \$10.00 from him.' Did you make that statement?"

121. For that the court erred in overruling defendant's objection to the following question:

"Did you make the further statement, 'I left there and went to the union hall and picked up Jesse Douglas. We left the hall and went to my home and I told my wife that I was going to Birmingham to make a trip. I told her that I didn't know who for or where we were going to make the trip. When we left Gadsden I had two shotguns, the rifle that we got at Bob Arrington's house on the night of 1-15-62, some shotgun shells that were in a army bandalier. We had no ammunition for the rifle in the car. The shotgun shells were all 12 gauge and were double 'O' buck and 'pumpkinballs'. The shotguns were a J. C. Higgins pump and an automatic shotgun that belongs to a B. F. Jackson in Gadsden and I do not know the make of this gun.' Did you make that statement?"

122. For that the court erred in overruling defendant's objection to the following question:

"Did you make the further statement that, 'Jessie Douglas and I went to Birmingham, Alabama; arriving there about 6:30 p.m. and checked in at the union hall to Sam Webb. Webb asked us if we knew why we were down there and I told him I thought to make a trip and he asked if Reneger had told us exactly why and I said that I thought I was to drive a truck somewhere. He said there was a little more to it than that and that there was two Bowman trailers at the West Brothers terminal in Birmingham that was going to run that night and we were to follow these trailers and scare them so they wouldn't be driving anymore. Webb asked me if I had anything to scare them with and I told him about the shotguns and rifle in my car and he said not to use the rifle because that might kill a driver that he thought the shotgun would be best. We left the union hall in Webb's car and he drove us by the West Brothers terminal to see if the trailers had left there. They were still there so we returned to the union hall. That was about seven p.m. in the evening. He asked if I had any other tags other than the tag that was registered to my car and I told him that I did [fol. 25] not. He told me to take the front tag off of his car and use it on my car.' Did you make that statement?"

123. For that the court erred in overruling defendant's objection to the following question:

"Did you further make the statement, 'I asked him what I would do with the tag if we made any contact with any trucks' and he said hold it and he would pick it up later. He did not offer to pay us any money at that time but he asked if we had any money to eat on. I told him I had borrowed \$10.00 before I left Gadsden, Alabama, and that my car was low on gas. He took us by a service station, a Texaco station near the union hall and filled the car with gas which he paid for on

his credit card. After we gassed up we went to the union hall and picked up Webbs tags from his car. He let us out of the rear door of the hall to go around to the side of the hall where his car was parked and Jesse and I took the front tags off his car.' Did you make that statement?"

124. For that the court erred in overruling defendant's objection to the following question:

"Did you make the further statement, 'We left the hall and drove toward Gadsden so that if anyone saw us they would think we were going back to Gadsden. We went out Tenth Avenue, crossed over one block to Georgia Road, and followed this road to First Avenue. We turned south on First Avenue and went all the way through Birmingham to the Birmingham-Bessemer Highway. We stopped at Mary's Drive-In for sandwiches and coffee and spent about an hour or an hour and a half there.' Did you make that statement?"

125. For that the court erred in overruling defendant's objection to the following question:

"Did you further make the statement, 'We waited there at the Drive-In because Webb had told us these Bowman trailers would be coming out the Birmingham-Bessemer Highway. We left Mary's Drive-In around nine p.m. or nine-thirty p.m. as we got tired sitting there and went south to Bessemer. We turned around near Bessemer and came back to a big bowling alley on this highway. Between the time we left Mary's Drive-In and about eleven p.m. we were loafing at the bowling alley and a doughnut shop on the highway. At about eleven p.m. we headed toward Birmingham and met the two Bowman trailers coming out being pulled by West Brothers tractors.' Did you make that statement?"

126. For that the court erred in overruling defendant's objection to the following question:

"Did you make the further statement, 'We turned off a side street and changed the tags on my car. We took both of my tags off, front and back, and put Webb's tag on the back of my car. We went back to the Birmingham-Bessemer Highway and headed south behind these trucks. We came up on the rear of these trucks on the hill which is near the Alabama Highway Patrol station in Midfield. We passed these trucks on this hill and went on ahead of the trucks through Bessemer. After getting through Bessemer we then speeded up to about sixty or seventy miles an hour and traveled down Highway 11 to the junction of 5 and 11. We turned down No. 5 toward Centreville, Alabama. We went to the city limits of Centreville and then turned around and went back north on No. 5. When we left Birmingham, Alabama, Douglas was driving and he was still driving at the time we turned around at the city limits of Centreville. I was going to handle the shooting and had gotten into the back seat of my car.' Did you make that statement?"

127. For that the court erred in overruling defendant's objection to the following question:

"Did you make the further statement, 'We intended to shoot these trucks before they got to Centreville, but when we turned and went back north and passed the trucks again I was unable to bring myself to the point of shooting the trucks. After we passed the trucks this time we turned around and went south again toward Centreville, Alabama. These trucks were both stopped at a truck stop in Centreville where we passed them again and we proceeded on south on No. 5 about twenty miles. We sat alongside of the highway waiting for the trucks to come on and several trucks passed us, so we thought we ought to move before someone recognized us. We went back north again and saw a station wagon that looked suspicious so we turned off No. 5 onto 16. We drove over this route about six or eight miles and pulled in behind a church. We sat there for about five minutes and then heard what

sounded two trucks together going south on No. 5. We thought this was the two trucks and we went back to No. 5. When we got to No. 5 I told Douglas that I would drive and he said that was fine because I knew the car better than he. I drove on until we caught these trucks about five or eight miles above the junction of No. 5 and No. 80 and we passed them proceeding on to the junction where we turned around and headed back north to meet these trucks. Jesse Douglas [fol. 26] was in the back seat with the automatic shotgun that belongs to R. F. Jackson and had it loaded with buckshot. He rolled down the window and when we passed these trucks he shot the lead truck as we passed them heading back north as they were coming south. We then went on to highway 14, turned left and went into Greensboro, Alabama. We turned left in Greensboro on No. 69, drove south about five miles and realized we were going the wrong direction to go to Tuscaloosa, Alabama. We turned around and went back up to No. 69 to Tuscaloosa. Did you make this statement?"

128. For that the court erred in overruling the defendant's objection to the following question:

"I judge that the truck was shot between two a.m. and two-thirty a.m. and between that time and when we got to Greensboro we stopped one time and switched the tags back on the car. After we got north of Tuscaloosa about twelve miles we stopped at Frederick's Truck Stop and gassed up. This was about four-thirty a.m. I bought \$5.00 worth of gas. This truck stop is on highway No. 11 out of Tuscaloosa. And about thirty minutes after we left there we stopped at the intersection of highway No. 11 and No. 5 by two Alabama highway patrolmen. When I turned to the right on No. 5 we were stopped and checked. They told us at that time there had been a truck driver shot in Dallas County and they were making a survey of all cars. They found my pump shotgun and a part of a box of

shells in the trunk of the car, but we had put the automatic and the rifle under the hood of the car between the grill and the radiator. I told them I had been hunting and had not taken my gun out of the car.' Did you make that statement?"

129. For that the court erred in overruling the defendant's objection to the following question:

"Did you make the further statement, 'We told them we were on our way to Anniston, Alabama, to hunt for work. They asked where we had come from and I said from Tuscaloosa, Alabama, but we did not live there, that we had been hunting for work and that we lived in Gadsden, Alabama. This check was made about five in the morning, and after this we headed toward Gadsden, Alabama. We went south on No. 5 toward No. 24 at West Blocton, Alabama, took No. 24 out of there and ran onto a dirt road where we were lost for some time. We finally hit a little country road No. 10 into Montevallo, Alabama, took No. 25 out of Montevallo and followed this to near Childersburg where we made a stop on a dirt road and there we put the automatic shotgun in the back seat and the shells in the well over the back fender. We had previously, when we changed the tags, put the tags belonging to Webb under the rubber floor mat on the driver's side. We continued on this dirt road until it came back out on No. 25 and followed this route on up through Leeds, Alabama. We took 78 out of Leeds to the junction of No. 78 and No. 77. We turned left on No. 77, headed north, and were stopped near Ohatchee, Alabama, by the police. After the police stopped us he waited there until an Alabama Highway Patrol car came up and the police drove my car with Douglas in it with him, and I rode with the Alabama Highway patrolman to the Alabama Highway Patrol station in Anniston, Alabama.' Did you make this statement?"

130. For that the court erred in overruling the defendant's objection to the following question:

"Ana then were you asked this question and gave this answer to it, "Who loaded the automatic shotgun?" 'I don't recall which one loaded it the last time.' Were you asked that question and was that your answer?"

131. For that the court erred in overruling the defendant's objection to the following question:

"Were you asked the question, 'How many shots were fired at the trucks?' And your answer, 'Only one.' Did you say that?"

132. For that the court erred in overruling the defendant's objection to the following question:

"Were you asked this question, 'Was the empty ejected inside the car?' And your answer, 'When it was fired, to the best of my knowledge it was.' Is that true."

133. For that the court erred in overruling the defendant's objection to the following question:

"Were you asked the question, 'What happened to the empty shell?' And your answer, 'To the best of my knowledge it was found by Douglas and thrown out the car some three to five miles north of the shooting.' Is that true?"

[fol. 27] 134. For that the court erred in overruling the defendant's objection to the following question:

"Were you asked the following question, 'Did Douglas say if he found the shell?' And then the answer was, "Yes, and he said he threw it out the window." Is that true?"

135. For that the court erred in overruling the defendant's objection to the following question:

"And then in your own handwriting did you say, 'I, Olen Ray Loyd, have had above read to me, consisting of ten pages, which I have initialed, and they are true and correct to the best of my knowledge.' And signed your name, 'Olen Ray Loyd'. Is that true?"

136. For that the court erred in overruling the defendant's objection to the following question:

"Then down below your name it was signed, 'Witnessed by Ralph Holmes, investigator for the Department of Public Safety of the State of Alabama; and under his name, 'James G. Clark, Sheriff, Dallas County, Alabama', and under his name, 'R. W. Godwin'. Was that done in your presence?"

137. For that the court committed prejudicial error in making the following statements in the presence of the jury, while the witness, Olen Ray Loyd was on said witness stand, which prejudicial remarks made by the said court influenced the jury in rendering a verdict against the defendant in this case.

"I have heretofore stated, since this witness has been on the stand, that the protection of the Fifth Amendment is not available to this defendant and that under the instructions of the court that he is required to answer relative to these pertinent questions as may be passed upon by the court."

138. For that said trial was conducted in an atmosphere of hostility, passion and prejudice, and that under the circumstances the defendant was unable to get a fair and impartial trial.

139. For that after the reading of portions of an alleged confession made by the witness, Olen Ray Loyd, the court committed prejudicial error in overruling defendant's motion for a mistrial.

140. For that the court committed prejudicial error in making the following statements in the presence and hearing of the jury, to the prejudice of the defendant in this case, which said statements influenced the jury in rendering a verdict against the defendant:

"Mr. McLeod, as to the witness presently on the stand, the court instructs you to file in the Circuit Court of Dallas County in Equity an information charging him

with contempt of Court, with a stipulation failure and refusal of the defendant to comply with the instructions and orders of this Court. The Court will set that matter down for hearing at its earliest convenience."

141. For that the court committed prejudicial error in compelling the witness, Olen Ray Loyd, to answer the following question:

"Mr. Loyd, I will ask you again, is that your signature (holding confession before witness)?"

142. For that the court committed prejudicial error in compelling the witness, Olen Ray Loyd, to answer the following question which was propounded to him by counsel for the state:

"Did you make a statement to Mr. Bob Fry, FBI agent, and Mr. Ralph Holmes, Mr. James G. Clark, Jr., at the Dallas County jail on January 20, 1962?"

[fol. 28] 143. For that the court committed prejudicial error in compelling the witness, Olen Ray Loyd, to answer the following question which was propounded to said witness by counsel for the state:

"Mr. Loyd, I show you a paper here, consisting of ten handwritten pages, and I ask you, is that your signature?"

144. For that the court committed prejudicial error in compelling the witness, Olen Ray Loyd, to answer the following question which was propounded to said witness by counsel for the state:

"I am asking you, is that your signature (holding confession before witness)?"

145. For that said trial was conducted in an atmosphere of hostility, passion and prejudice and that under the circumstances the defendant did not receive a fair and impartial trial.

146. For that the court erred in allowing prejudicial testimony to be offered, over objection of the defendant, which improperly influenced the jury.

147. For that the court erred in allowing expert testimony to be offered without a proper predicate being laid as a foundation for said testimony.

148. For that the court erred in allowing illegal conclusions and opinions to be put in evidence over objections of the defendant.

149. For that the court erred in allowing hearsay evidence to be offered in evidence.

150. For that the court erred in allowing illegal confession to be introduced into evidence.

151. For that the court erred in allowing immaterial, irrelevant, and illegal testimony to be offered in evidence.

152. For that the court erred in allowing opinion testimony to be given by persons not proven to be experts in the field to which they were testifying.

153. For that the court erred in allowing incompetent evidence to be given by incompetent and unqualified witnesses.

154. For that the court erred in putting the defendant in jeopardy without a proper preliminary hearing or arraignment to the detriment of defendant's rights under the constitution and laws of the State of Alabama, and the constitution and laws of the United States.

155. For that the court erred in that the defendant was denied "due process" under the constitution and laws of the State of Alabama and the constitution and laws of the United States.

Sam Earl Esco, Jr., Bryan Chancey, Charles Cleveland, Attorneys for the defendant.

[fol 29] This is to certify that I have this day served a copy of the foregoing Motion on the Hon. Blanchard McLeod, Solicitor, by depositing a copy of this Motion in the

United States Mail, postage prepaid, to his residence at Camden, Alabama.

This the 30th day of March, 1962.

Sam Earl Esco, Jr.

IN THE CIRCUIT COURT OF DALLAS COUNTY.

STATE OF ALABAMA

ORDER SETTING MOTION FOR HEARING—Filed March 30, 1962

The foregoing Motion was presented to me on this the 30th day of March, 1962, and the same is hereby continued to the 24 day of April, 1962, at 11 a.m. and execution is hereby ordered stayed pending the final disposition of said Motion.

James A. Hare

IN THE CIRCUIT COURT OF DALLAS COUNTY

STATE OF ALABAMA

MOTION FOR CONTINUANCE

Now comes the defendant in the above styled cause and moves the Court that the motion for new trial filed in the above styled cause on March 30, 1962, and set down for hearing on April 24, 1962, be continued on the following grounds.

1. That the transcript previously ordered in this cause has not yet been completed and, therefore, the defendant is unable to support the foregoing motion until such time as said transcript is completed.

Attorneys for Defendant, Sam Earl Esco, Jr., Bryan Chancey, Charles Cleveland, By Sam Earl Esco, Jr.

This is to certify that I have this day served a copy of the foregoing Motion on the Hon. Blanchard McLeod, Solicitor, by depositing a copy of this Motion in the United

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States Mail, postage prepaid, to his residence at Camden,
Alabama.

This the 23rd day of April, 1962.

Sam Earl Esco, Jr.

IN THE CIRCUIT COURT OF DALLAS COUNTY
STATE OF ALABAMA

ORDER SETTING MOTION FOR HEARING—Filed April 23, 1962

The foregoing Motion was presented to me on this the 24 day of April, 1962, and the same is hereby continued to the 23 day of May, 1962, at 10 A. M. and execution is hereby ordered stayed pending the final disposition of said Motion.

James A. Hare

[fol. 30]

IN THE CIRCUIT COURT OF DALLAS COUNTY
STATE OF ALABAMA

MOTION FOR CONTINUANCE OF MOTION FOR NEW TRIAL

Comes the defendant, Jesse Elliott Douglas, and shows unto the Court that he has taken an appeal to the Alabama Court of Appeals from the judgment rendered in the above cause on March 3, 1962, and further shows unto the Court that subsequent to taking of said Appeal, the defendant did file a Motion for New Trial which said Motion has been set for hearing on Thursday, May 24, 1962, at 10:00 A. M.

Defendant further shows that the transcript of the evidence of the above captioned case has not been transcribed as of this date.

Whereas, the defendant moves this Court to continue the hearing on the Motion for New Trial until 10:00 A. M., Thurs., June 21, 1962.

Sam Earl Esco, Jr., As Attorney for Defendant,
Jesse Elliott Douglas, Appellant in the Alabama
Court of Appeals.

This is to certify that I have this day served a copy of the foregoing Motion on the Honorable Blanchard McLeod, Solicitor, by depositing a copy of this Motion in the United States Mail, postage prepaid, to his residence at Camden, Alabama.

This the 24th day of May, 1962.

Sam Earl Esco, Jr.

IN THE CIRCUIT COURT OF DALLAS COUNTY
STATE OF ALABAMA

ORDER SETTING MOTION FOR HEARING—May 24, 1962

The foregoing Motion was presented to me on this the 24 day of May, 1962, and the hearing herein above described set for 10:00 A.M., Thursday, May 24, 1962, is hereby continued to the 21 day of June, 1962, at 10 A.M., and execution is hereby ordered stayed pending the final disposition of said Motion.

James A. Hare, Circuit Judge.

[fol. 31]

IN THE CIRCUIT COURT OF DALLAS COUNTY
STATE OF ALABAMA

ORDER DENYING MOTION FOR A NEW TRIAL—July 12, 1962

Came the parties by their attorneys, and the Defendant's motion to set aside the verdict of the jury heretofore rendered in this cause and the judgment of the Court entered thereon, and to grant a new trial herein, having been argued by counsel and submitted to the Court on the 21st. day of June, 1962, the Court after due consideration is of the opinion that the verdict of the jury was amply supported by the evidence in the case, that there was no error in the record, and that said motion should be denied.

It is therefore considered, ordered, and adjudged by the Court that the Defendant's motion to set aside the verdict of the jury heretofore rendered in this cause and the judg-

ment of the Court entered thereon and to grant a new trial herein, be, and the same is hereby overruled and denied. And to the ruling of the Court the defendant in open Court does duly and legally except thereto.

This the 12th day of July, 1962.

James A. Hare, Judge of the Circuit Court of Dallas County, Ala.

[fol. 32]

IN THE CIRCUIT COURT OF DALLAS COUNTY

STATE OF ALABAMA

Criminal Case No. 9392

STATE OF ALABAMA, Plaintiff,

versus

JESSE ELLIOTT DOUGLAS, Defendant.

Charge: Assault With Intent to Murder

Selma, Alabama

Transcript of Proceedings—March 1, 2, 3, 1962

Before: Hon. James A. Hare, and a Jury.

APPEARANCES:

Hon. Blanchard L. McLeod, Solicitor for the Fourth Judicial Circuit of Alabama, Hon. Henry F. Reese, Assistant Solicitor for Dallas County, Alabama, of counsel, Attorneys for the Plaintiff.

Hon. Sam Earl Esco, of counsel, Attorney for the Defendant.

[fol. 33] (Entire jury venire is excluded from the court room.

Mr. McLeod: The State of Alabama, acting by and through its solicitor, Blanchard L. McLeod, denies each and every allegation in the defendant's motion to quash and demands strict proof thereof.

JODIE M. GASTON, being duly sworn, testified as follows:

Direct examination.

By Mr. Esco:

Q. Mr. Gaston, state your full name, age and residence to the Court, if you please.

A. Jodie M. Gaston, age forty-five, 2001 Cannon Lane.

Q. Mr. Gaston, you were on the last grand jury of Dallas County, Alabama, were you not?

A. Yes, sir.

Q. That returned an indictment against Mr. Loyd and Mr. Douglas?

A. Yes, sir.

Q. That is Jesse Elliott Douglas?

A. Yes, sir.

Q. I wish you would state to the Court at this time, Mr. Gaston, whether or not you are a registered voter in this county.

A. I am a registered voter.

Q. Will you state to the Court just what evidence was given to that grand jury and by whom, upon which this indictment was returned?

Mr. McLeod: I object to that question. That is a question in two parts, and I object to that part calling for the evidence that was presented.

The Court: Sustain the objection.

Mr. Esco: We except, if you please.

Q. Will you tell what witnesses appeared before that grand jury?

A. Well, the sheriff, Mr. Clark.

Q. Was Sheriff Clark the only witness that appeared, Mr. Gaston?

A. Yes, sir.

Q. Did you have any legal documents upon which this indictment was based, that the grand jury studied?

A. If you consider the confession of Loyd a document, yes.

Q. That is the only document that you considered, was a purported confession of another party?

A. Yes, sir.

Q. Did he in that purported confession say that he was an accomplice?

Mr. McLeod: I object to his going into the evidence, your Honor.

The Court: If he knows I will let him answer.

Q. You may answer.

A. Loyd said that Douglas was an accomplice, yes.

Q. Did you study any other documents?

A. No, sir.

Q. Now, will you state to the Court exactly what evidence Sheriff Clark gave?

Mr. McLeod: I object to that question, your Honor.

The Court: Yes, sir, I sustain the objection as to what evidence he gave.

Mr. Esco: We except, if you please.

[fol. 34] Q. Did Sheriff Clark make any demonstrations to you of evidence?

Mr. McLeod: I object to that question, your Honor.

The Court: Overrule.

Q. Did he make any sort of demonstrations? Demonstrate any evidence?

A. No.

Q. What type of evidence did Sheriff Clark render? What nature was it?

A. Paper, with some writing on it.

Q. This purported confession you referred to?

A. Yes.

Q. And he gave no other evidence, as such?

A. No, but he said that they had other evidence that was being checked.

Q. But he did not present it to the grand jury?

A. No.

Mr. Esco: I believe that's all. Thank you, sir.

Cross examination.

By Mr. McLeod:

Q. Mr. Gaston, did one or more witnesses testify before the grand jury as to the commission of this crime out on No. 5 highway and where Charles L. Warren was shot? Did someone tell you all that a crime had been committed out there?

Mr. Esco: Your Honor, please, we are going to object unless it was Sheriff Clark. You ruled out my going into the evidence.

Mr. McLeod: I'm not going into the evidence.

Mr. Esco: You are stating evidence and asking him if that is a fact. You are leading.

Mr. McLeod: Yes, and I'm reading a Supreme Court opinion right here, word for word what I said in that question.

Mr. Esco: Well, I'm going to object to it. I don't know what supreme court that is.

Mr. McLeod: State of Alabama. I withdraw that, and ask another question.

Q. Mr. Gaston, were you informed by a witness that a man had been shot out on Highway 5?

Mr. Esco: We object, your Honor, to a leading question. He prevented me from going into the evidence and now he is going into the evidence himself. We don't object to it on that ground. We object to it on the ground it is leading.

The Court: Overrule the objection.

Mr. Esco: We except, if you please.

Q. You can answer.

A. We knew that there was a man shot out there. Yes.

Q. And someone told you before the grand jury that he had been shot, didn't they? Some witness?

A. I don't believe I just understand what you are referring [fol. 85] ring to. Before the grand jury met or—?

Q. Before the grand jury voted, while you were in there as a member of the grand jury, was evidence brought before you—

The Court: (Interrupting) Ask him if Mr. Clark testified.

Q. Did Mr. Clark testify and tell you that a man had been shot out here on No. 5 highway by the name of Charles L. Warren?

A. Yes, sir. I'd already stated that.

Q. And did he testify to other facts involved in that crime?

A. Yes, sir.

Q. And did Sheriff Clark give the grand jury evidence that the defendant, Jesse Elliott Douglas, was involved in that shooting?

A. Yes, sir.

Q. And beside his testimony did he have a legal document before you?

A. He had a document, yes, sir.

Mr. McLeod: That's all, Mr. Gaston.

Redirect examination.

By Mr. Esco:

Q. Mr. Gaston, in addition to Sheriff Clark telling you that a man had been shot, what else did he tell you?

A. He read the confession of Mr. Loyd, and Loyd implicated Douglas.

Q. Is that the purported confession?

A. Yes, sir.

Q. And you don't know of your knowledge whether that's a legal document or not, do you?

A. No. Of my knowledge, no.

Q. Now, what other facts did he testify to?

Mr. McLeod: Now, I'm going to object to his going into details about it, your Honor.

Mr. Esco: I don't know how much details you can go into, Judge.

Mr. McLeod: You can't go into any.

Mr. Esco: He opened the door.

The Court: I think he can testify generally, but as to any particulars of the evidence submitted before the grand jury, I don't think it is competent.

Read the question back, Mrs. Bailey.

Court Reporter: (Reading from her notes) "What other facts did he testify to?"

The Court: Yes, sir, I sustain the objection to that question.

Mr. Esco: We except, if you please.

Q. And you said he presented other evidence that connected Mr. Douglas with this incident. Can you tell me what other evidence he presented?

A. I can tell you of two things he said he had in his possession that would implicate him if the Court wants that information.

[fol. 36] Q. That he had in his possession.

A. Yes, sir.

Q. All right, sir. Did he show them to you?

A. He did not.

Q. He just told you that he had them.

A. He said the toxicologist was studying them.

Q. I see. But he didn't demonstrate any evidence to you at all!

A. No.

Q. Did he tell you that he himself had seen this incident?

A. Seen the incident? You mean the actual shooting?

Q. Yes.

A. No, sir, he did not.

Q. And Sheriff Clark, as the only witness appearing, told you that a man had been shot, that he had some evidence that was being examined by the toxicologist, and he had a purported confession. Is that all of the evidence that he had connecting Mr. Douglas with this crime?

A. That's all I can think of at this time.

Mr. Esco: I believe that is all.

Mr. McLeod: Come down, Mr. Gaston.

GENE E. COFFEE, being duly sworn, testified as follows:

Direct examination.

By Mr. Esco:

Q. Mr. Coffee, were you a member of the last grand jury of Dallas County which returned an indictment against Jesse Elliott Douglas?

A. Yes, sir.

Q. Would you—I'm sorry, I don't believe I had you state your full name and address to the Court.

A. Gene E. Coffee, Route 2, Summerfield Road.

Q. And what is your age, Mr. Coffee?

A. Thirty-two.

Q. You are a registered voter of Dallas County?

A. Yes.

Q. And you were a member of the grand jury that met in Dallas County, Alabama, and returned an indictment against Jesse Elliott Douglas?

A. Yes.

Q. If you will, Mr. Coffee, tell the Court just what witnesses appeared before the grand jury?

A. Sheriff Clark.

Q. Is that the only witness?

A. As I remember, that was the only witness.

Q. Were any legal documents examined by that grand jury upon which this indictment was rendered?

A. We were presented with a confession, a signed confession.

Q. A purported—did you see that confession signed?

A. I saw the signature on it.

Q. You saw a signature on it?

A. Yes.

Q. And who signed that purported confession, Mr. Coffee?

A. It was—I'm not sure now.

Q. Was it Mr. Douglas, the man who was indicted?

A. No—I'm not sure—I don't remember.

Q. Do you know, as a matter of fact, that it was not Mr. Douglas who signed it?

[fol. 37]. A. No, I don't know.

Q. Was it signed by someone who named Mr. Douglas as an accomplice?

A. I believe that's the way it was.

Q. It was signed by someone else who named Mr. Douglas as an accomplice.

A. (No answer)

Q. Now, what evidence did Sheriff Clark offer to the grand jury on which this indictment was based? What sort of evidence?

A. Well, we had the confession and the shotgun shell.

Q. Shotgun shell. Was there anything else before the grand jury?

A. Not that I remember.

Q. Did Sheriff Clark testify that he witnessed this incident?

A. No.

Q. What did he testify to, Mr. Coffee?

Mr. McLeod: We object to that question, if he is going into the evidence, your Honor.

The Court: Yes, sir, sustain the objection.

Mr. Esco: We except, if you please.

Q. Did he offer any eye witness accounts of what he saw, concerning this incident? Did he say that he saw any part of the incident, or relate any facts concerning any part that he saw concerning it?

A. None that I remember, except in relation to the investigation.

Q. Will you state just what he did relate?

Mr. McLeod: Now, I object to any evidence. He can say he discussed certain phases of it, but I don't want him to go into any evidence.

The Court: Just state in general terms, Mr. Coffee. You can't go into details.

Q. Tell us what phases he discussed that he knew of his own personal knowledge. Things that he said that he knew of his own personal knowledge.

A. Well, all that I can remember would be pertaining to this confession, and this shell as material evidence that was found upon the investigation.

Q. Did he state that this shell was found at the scene of the accident—of the incident?

A. Yes, in the vicinity there. I guess is what you'd call it.

Q. In the vicinity, How far did he say it was found?

A. I don't remember.

Q. Do you remember whether he said five miles? Three miles?

Mr. McLeod: I object to that. Going into the evidence.

The Court: Yes, sir. Sustain the objection.

Q. What was your interpretation of vicinity?

Mr. McLeod: I object to that question, your Honor.

The Court: Overrule. He can answer.

A. Well, I'd say within a number of miles. I don't remember exactly how far. As I remember, the distance was measured, according to the witness before us, I think.

[fol. 38] Q. Well, was it nine and six-tenths miles?

A. It could have been. I don't remember exactly what was told to me on that day—the figure.

Q. Did he bring you any direct evidence at all that a crime had been committed?

A. Well, we knew about that. Yes.

Q. How did you know, Mr. Coffee?

A. Well, we knew about the man in the hospital that had received the wound.

Q. How did you know about that?

A. Well, we was told about it.

Q. By whom?

A. Well, the sheriff, for one.

Q. Before the grand jury?

A. We knew that was the reason he didn't appear there.

Q. You were told by the sheriff about the man in the hospital?

A. Yes.

Q. And what were you told by the sheriff about him?

Mr. McLeod: I object to that question.

The Court: Sustain the objection.

Mr. Esco: We except, if you please.

Q. Did you yourself observe the man in the hospital?

A. No.

Q. Did any man on the grand jury?

A. Not to my knowledge.

Q. Did any other witnesses appear before the grand jury except Sheriff Clark?

A. I don't believe so.

Q. Did he bring you any physical evidence at all, showing or demonstrating to you that a crime had been committed?

A. Yes, sir, the evidence that we have talked about before.

Q. And that demonstrated to you that a crime had been committed?

A. Yes. We were satisfied of that fact.

Q. From the evidence produced before the grand jury? Or from evidence or things that you had heard before you went in the grand jury?

A. Well, I don't remember hearing any particulars at all before we went to the grand jury.

Q. What evidence did the grand jury have before it that Mr. Douglas participated in that incident?

A. Well, the facts in the confession.

Q. In somebody else's confession.

A. Yes, sir.

Q. Was that a handwritten confession?

A. I believe it was. Yes.

Q. Did you recognize the handwriting in that confession?

A. No.

Q. Did you recognize the signature signed to that confession?

A. No.

Q. Was that the only evidence offered to you as a grand jury, or as a member of the grand jury, that connected Mr. Douglas with this incident?

A. I believe so. Yes.

Q. And the only evidence that you had before you that a crime had been committed was what Sheriff Clark told you about a man being in the hospital. Is that correct?

A. Yes.

Mr. Esco: I believe that's all.

[fol. 39]

Cross examination.

By Mr. McLeod:

Q. Mr. Coffee, did Sheriff Clark go into details and tell you all about the investigation of this crime?

A. Yes, sir.

Q. And did he inform you and the other members of the grand jury that a crime had been committed on No. 5 highway, in which one Charles L. Warren was shot in a truck?

A. Yes, sir.

Q. And did he give testimony before that grand jury involving the defendant here, Jesse Elliott Douglas?

A. Yes.

Mr. Esco: If your Honor please, we are going to object and move to exclude the previous answer on the grounds that the prosecution has objected—that if he can go into details, we feel that we should be able to go into details.

The Court: Read the last question back, Mrs. Bailey.

Court Reporter: (Reading from her notes) "And did he give testimony before that grand jury involving the defendant here, Jesse Elliott Douglas?"

The Court: Overrule.

Mr. Esco: We except.

Mr. McLeod: Your witness.

Redirect examination.

Q. Answer the question.

Mr. McLeod: I thought he answered it.

Mr. Esco: What was his answer, please, ma'am?

Court Reporter: He said, "Yes."

Q. What was ~~that~~ testimony?

Mr. McLeod: I object to any of the evidence. The fact that he did it, I don't object to that, but I do object to the evidence that he presented.

The Court: Sustain the objection.

Q. How did he connect Mr. Douglas with the incident?

A. You mean the confession?

Q. I'm asking you. You say he gave testimony. How? How did he connect him?

A. Well, he was in the car, in the automobile.

Q. Who was in the automobile?

A. Mr. Douglas.

Q. He was in what automobile?

A. Well,—

Mr. McLeod: (Interrupting) I object. Wait, Mr. Coffee, I object to that. That's going into the evidence, and I object to that.

Mr. Esco: We are simply asking him how did he connect him with this incident. The incident down there, the incident that happened.

[fol. 40] Q. Were you told where the incident occurred, Mr. Coffee?

A. Yes, sir.

Q. All right. Now, how was Mr. Douglas connected with that?

Mr. McLeod: I object to that question, your Honor.

Q. What type of evidence was given to connect him with it?

A. Well, that would be the evidence from the confession.

Q. The evidence related from somebody else's confession, Mr. Coffee, is that right?

A. Yes.

Q. And that's the only way you connected Mr. Douglas, with somebody else's purported confession, signed by a purported accomplice, was the only evidence before the grand jury connecting Mr. Douglas with this incident. Is that right?

A. Basically I guess that's right, because—as I remember, the information that we had came from the confession and from the investigation of the sheriff, which were related to us.

Q. And did he demonstrate to you anything that was a result of that investigation?

A. You mean what he found out?

Q. No, what he found. Did he find any physical evidence that he demonstrated to you?

A. You mean by physical evidence objects?

Q. That's right.

A. Well, the shell I guess would be a physical object.

Q. You mean by "the" shell, you mean by "a" shell?

A. Yes. Or physical objects, they had guns taken from the automobile.

Q. You had guns before the grand jury?

A. No, not before the grand jury, but he told us about guns that they had.

Q. What did he tell you about them?

Mr. McLeod: I object to that question. I object to it.

The Court: Yes, sir. Sustain the objection.

Mr. Esco: We except, if you please.

Q. Did he tell you that the gun from some automobile that he had matched this shell that he presented to you?

A. Yes, I believe so.

Q. And he told you that a gun that had been taken from some automobile matched the shell that was before you?

Mr. McLeod: I object to that question, your Honor.

The Court: Sustain the objection.

Mr. Esco: We except, if you please.

Q. To the best of your knowledge, Mr. Coffee, is the only evidence that the grand jury had before it connecting Mr. Douglas with that incident was a purported confession signed by somebody that you did not know and did not know his signature? Is that a true statement?

A. As I remember, I guess that's it.

Mr. Esco: Thank you, sir.

[fol. 41] Recross examination.

By Mr. McLeod:

Q. Now, Sheriff Clark, besides this confession he brought in, he made a general discussion of the entire investigation, didn't he?

A. Yes.

Q. And he went into details about all phases of it, didn't he?

A. Yes, sir.

Q. And I went into details about the part I was in on about the investigation, didn't I?

A. Yes, sir.

Q. And you were informed that a crime had been committed?

A. Yes, sir.

Q. And you were informed of facts by the sheriff, involving this defendant, Jesse Douglas?

A. Yes, sir.

Mr. McLeod: That's all.

Redirect examination.

By Mr. Esco:

Q. What were those facts connecting Mr. Douglas with this?

Mr. McLeod: I object to any statement of evidence, your Honor.

The Court: Sustain the objection.

Mr. Esco: We except, if you please. If your Honor please, he has testified one time that the purported confession was the only way Mr. Douglas was connected. And now he has testified another, and I think I deserve the right to clarify that.

Q. Can you clarify those two conflicting statements?

A. Well, you were asking for physical evidence, and we got a lot of other descriptions, very extensive relations of investigations and findings of a number of things that covered a number of facts, that gave us information about the whole incident and the investigation up to that time. And then you asked me for the physical evidence, and that's what I was trying to tell about.

Q. Well, to the best of your knowledge Sheriff Clark was testifying purely from what he had been told, was he not?

A. Well, that and what he had found out with his investigation.

Q. At no time did he tell you that he had observed the shooting or escaping car or anything surrounding the incident himself, did he?

A. No.

Q. And this purported confession that you saw was a handwritten document. Did you recognize that handwriting?

A. No; I didn't recognize the handwriting.

Q. And did you recognize anything about it that would indicate to you that you knew who had written it or signed it?

A. No. I had to go on what I was told.

Q. And do you know that it was purportedly written by an accomplice of Mr. Douglas?

A. Yes.

Q. But it was not written, signed, or witnessed by Mr. Douglas, was it?

A. I don't believe so.

[fol. 42] Mr. Esco: I believe that's all.

Mr. McLeod: Come down, Mr. Coffee.

WARREN DUNDON, being duly sworn, testified as follows:

Direct examination.

By Mr. Esco:

Q. Mr. Dundon, state your full name, age and address to the Court.

A. Warren Dundon, I live at 2016 Elkdale, Selma, 44 years old—45 years old.

Q. Are you a registered voter in Dallas County?

A. Yes, sir.

Q. Were you foreman of the last grand jury that met in Dallas County, Alabama, which returned an indictment against Jesse Elliott Douglas?

A. Yes, sir.

Q. Will you state to the Court what witnesses appeared before the grand jury which returned this indictment?

A. Mr. Clark, the sheriff, was there.

Q. Any other witnesses?

A. I don't recall any other names.

Q. Did you examine any legal documents of any sort?

A. Only the confession.

Q. Mr. Douglas' confession?

A. Yes, sir.

Q. You examined a confession signed by Mr. Douglas?

A. Yes, sir. Well, I don't recall whether it was Mr. Douglas or not. It was the man who was held here in connection with this shooting.

Q. Well, now, there are three people held in connection with this shooting. You returned three indictments. Do you recall whose purported confession it was?

A. The man who was in jail here. The man who was—I can't recall the name, no.

Q. Do you know what evidence you had before you which connected Mr. Douglas with this incident?

A. There was a shotgun shell along with this written confession, this signed confession.

Q. Did you recognize the handwriting in that confession?

A. No.

Q. Was it a handwritten confession?

A. Yes.

Q. Did you recognize that handwriting?

A. No.

Q. And you do not know who wrote the confession?

A. I do not.

Q. Was it purportedly signed—were you told that the confession was signed by an alleged accomplice of Mr. Douglas?

A. No.

Q. Where you told by whom it was signed?

A. Well, I can't recall this name, but it was the man who was in the company of the man who did the shooting.

Q. That confession, purported confession, claimed that Mr. Douglas pulled the trigger. Now can you distinguish as to which one signed the purported confession?

A. Well, I am confused as to the names in this thing. The man who signed the confession, leaving names out of this, is not the man who did the shooting—as I understood it.

Q. Do you know of your own knowledge that either man charged with the crime signed the confession?

[fol. 43] A. No, sir.

Q. The only knowledge that you have that he signed it is hear-say.

A. What I saw and what I was told.

Q. And what did you see, sir?

A. I saw a signed confession.

Q. But you do not know of your own knowledge who signed it.

A. No, sir.

Q. And you do not know that it was either one of the prisoners?

A. I have no way of knowing.

Q. Now, did Sheriff Clark present any other physical evidence, other than the shell?

A. None that I recall.

Q. None that you recall.

A. No.

Mr. Esco: I believe that is all.

Cross examination.

By Mr. McLeod:

Q. Mr. Dundon, did Sheriff Clark discuss with the grand jury the investigation of this crime and the facts that were revealed?

Mr. Esco: If your Honor please, that is a leading question.

Mr. McLeod: This is on cross-examination too, your Honor.

The Court: Overrule.

Mr. Esco: We except, if you please.

A. Yes, sir.

Q. And in this, did he testify before the grand jury that one Charles Warren had been shot down on No. 5 highway?

A. Yes, sir.

Q. And did he give you, the grand jury, evidence that one Jesse Elliott Douglas was involved in that crime whereby that man was shot?

A. Yes, sir.

Mr. McLeod: That's all.

Redirect examination.

By Mr. Esco:

Q. What type of evidence were you given, Mr. Dundon, that connected Mr. Douglas with that incident?

A. The shotgun shell and the confession.

Q. How was the shotgun shell connected with him?

A. Well,—

Mr. McLeod: (Interrupting) I object to any testimony that enters the evidence.

The Court: Yes, sir, sustain the objection as to the evidence.

Q. How did you connect the shotgun shell with Mr. Douglas?

Mr. McLeod: I object to any testimony on the evidence.

The Court: Overrule.

[fol. 44] A. I was told that the shotgun shell matched the gun that fired it.

Q. Where was that gun?

A. I was told the gun was found in the automobile.

Q. In what automobile?

A. In the automobile that these two men were connected with or were in at the time of the shooting.

Q. "Were in at the time of the shooting," now, did he say that anyone saw these men? Did Sheriff Clark say that he saw these men in that automobile at the time of the shooting?

A. No, sir.

Q. Did he say where he got the shotgun out of the car, and where the car was located?

Mr. McLeod: I object to going into the evidence, your Honor.

The Court: Yes, sir, sustain.

Mr. Esco: We except, if you please.

Q. Did he say he got the gun out of a car at the scene of the crime?

Mr. McLeod: I object to that question, your Honor.

The Court: Sustain the objection.

Mr. Esco: We except, if you please.

Q. Did Sheriff Clark testify that he observed any of this part of this crime or anybody fleeing therefrom, or any automobiles fleeing therefrom?

A. No, sir.

Mr. Esco: I believe that is all.

Mr. McLeod: Come down, Mr. Dundon.

Mr. Esco: That is all of the evidence we have at this time.

(Mr. Esco addresses the Court)

Mr. McLeod addresses the Court:

MOTION TO QUASH INDICTMENT OVERRULED AND DENIED

The Court: Motion to quash the indictment, filed by the defendant in this cause, coming on to be heard and evidence had in open Court, and the Court considering the same, the Court is of the opinion that the motion is not well taken. Therefore, it is ordered and adjudged that the motion be and hereby is overruled and denied.

Mr. Esco: We reserve an exception.

The Court: To which action on the part of the Court, the defendant does duly and legally except.

(End of Hearing on Motion to Quash the Indictment)

Mr. Esco: Judge, I have a motion for a continuance. If you will give me about five minutes to check it over I will be ready.

The Court: All right, sir.

(Court stands in recess for a few minutes, then called to order)

Mr. Esco: At this time we file a motion for a continuance [fol. 45] on the grounds that we have eleven witnesses who are not available to us because they are defendants in a trial in process in the Circuit Court of Jefferson County,

Alabama; and on the second ground that the venire which has been drawn for the trial of this case has been subjected to numerous newspaper reports, radio, news broadcasts and television programs, detailing the evidence which has been produced on a companion case which has this date been submitted to a jury which is still out and has not rendered a verdict. Those are the essential reasons for the motion, as set out within the motion itself.

(Mr. Esco hands said motion for a continuance to the Court)

Mr. McLeod: Are you through, Mr. Esco?

Mr. Esco: I'm sorry, yes. Here are some exhibits, your Honor.

Mr. McLeod: The State replies to Mr. Esco that these witnesses—the presiding judge in this case, Hon. James A. Hare, personally contacted the presiding judge of the Tenth Judicial Circuit, Jefferson County, Alabama, and has been informed by the presiding judge of that Court that these witnesses will be made available to the defense at any time that the defense calls and notifies them, giving the hour they want them here, and will see to it that they are here and they will be excused in the case that they are in in Jefferson County for the purpose of proceeding to Dallas County to testify in this case.

Mr. Esco: If your Honor please, I'd like for the record to be straight on that point. The judge of no court can release these defendants from being present during the continuance of their case, or the trial of their case with the defendants. Not only a judge, but nobody else on earth.

The Court: It is the Court's presumption that Judge Bowron is also familiar with that fact.

The Court: Are there any witnesses?

Mr. Esco: Judge, we have offered exhibits. They are newspaper articles which detail evidence that is illegal to a trial jury. It details evidence of motions, evidence that's been argued before this Court outside of the hearing of the jury that tried the previous case. It goes into great detail of the confession, mentions things about the confession that didn't even go to this petit jury, things which were read by the members of this venire, who are all Dallas Countians and who subscribe to the Selma Times-Journal

which published these articles. These articles are in such detail that this venire is so prejudiced, and bound to be so prejudiced, and bound to know so many of the facts and portions of the testimony, which are illegal, that they could not render a fair verdict in this case. We feel that they are so well aware of the facts at this time that it would be [fol. 46] absolutely impossible to impanel a jury from that venire who has not read these articles.

The Court: I will give you every opportunity in the world to examine the venire as to any reading they have done.

Mr. Esco: I can examine the venire in support of this motion, if your Honor would like.

The Court: We can get them all in here now and go through the same procedure again.

Mr. McLeod: First, I want to object to all of these clippings in here that do not pertain to this trial in Dallas County, Alabama.

Mr. Esco: They are before the Judge. I am sure he will consider only legal evidence.

(Above described newspaper articles admitted in evidence as Defendant's Exhibit A, subject to Mr. McLeod's objection excluding everything that does not pertain to this trial in Dallas County, Alabama; and as they cannot be conveniently copied into the record are sent to the Supreme Court as original evidence for its inspection)

MOTION FOR A CONTINUANCE OVERRULED AND DENIED

The Court: Motion for a continuance made by the defendant in this cause coming on to be heard, and the same being considered by the Court, the Court is of the opinion that the motion for a continuance is not well taken; and it is, and the same hereby is, overruled and denied.

Mr. Esco: I reserve an exception.

The Court: To which action on the part of the Court the defendant does duly and legally except.

(End of Hearing on Motion for a Continuance)

CALLING OF WITNESSES, ETC.

(Witnesses for the State are called)

(Witnesses for the defendant are called)

Mr. Esco: Eleven of these witnesses that are not here, your Honor, are in Birmingham. On the motion for a continuance it was shown they can't be here. For the purpose of the record, motion for a continuance is made on the ground that the following witnesses are absent and not available at the time this case is called: Dr. C. J. Rehling—

Mr. McLeod: (Interrupting) He is here.

Mr. Esco: I am sorry. Show him as having shown up. W. W. Norris, Chester McNickle, Lt. Willie Painter, Dr. Nelson Grubbs, Patsy Jean Oliver, H. D. Frederick.

Mr. McLeod: Your Honor, I can guarantee the Court that I will have every one of those here.

[fol. 47] The Court: Well, he can make a showing for them—

Mr. McLeod: Yes, sir, that's right. If he makes a showing I'll agree to it.

Mr. Esco: Let the record show that the defense has not made a showing as to what these witnesses would testify to or as to what they would be witnesses to. Because of their character and because of the character of this case, the defense does not reveal at this time the importance of these witnesses.

The Court: Well, if you can't reveal the importance of them to the Court, why, motion for a continuance is just overruled.

Mr. Esco: We reserve an exception, if you please.

The Court: To which action on the part of the Court the defendant does duly and legally except.

(Witnesses for both sides are sworn and the rule invoked. Witnesses leave the court room)

The Court: What says the State? Are you ready?

Mr. McLeod: The State is ready, your Honor.

The Court: What says the defendant?

Mr. Esco: The defendant is ready.

The Court: Have the venire come in, please.

(The venire takes seats in the court room)

(The venire is qualified by the Court)

The Court: Are there any special qualifications?

Mr. Esco: I would like to question on voir dire.

The Court: When counsel for the defendant asks questions, please signify your reply by holding up your hands.

(Mr. Esco questions the venire)

Mr. Esco: I challenge for cause Mr. Bamberger.

The Court: This is for your information.

(Mr. Esco continues questioning the venire)

Mr. Esco: Mr. Hubbard, do you have a biased opinion?

Juryman Hubbard: Yes, I do.

Mr. Esco: You are biased?

Juryman Hubbard: Yes, sir.

Mr. Esco: I challenge for cause.

The Court: Challenge is granted.

(Mr. Esco continues questioning the venire)

Mr. Esco: (To a particular juryman) Would you be prejudiced for or against the defendant?

[fol. 48] The Court: Let me ask him. From your reading of the articles in newspapers have you arrived at such an opinion as would bias you where you could not return a fair and impartial verdict?

A Juryman: If those facts were true I would have an opinion.

Mr. Esco: We challenge for cause.

The Court: They are not at issue in the trial of this case.

Mr. Esco: They were testified to by witnesses under oath.

The Court: I will honor your challenge. What is your name, sir?

A Juryman: George Cook.

(Mr. Esco continues questioning)

Mr. Esco: If the facts in this newspaper were true—

Mr. McLeod: (Interrupting) We object to that.

The Court: You can ask if the facts and circumstances, if from those facts he formed an opinion which would bias

or prejudice him in the trial of this case. Revise your question now and I will pass on it.

Mr. Esco: My question to the venire is: Have you read the newspapers, and if the facts reported therein are true would you be prejudiced for or against this defendant?

The Court: It is whether they have formed a biased opinion from reading those articles. Yes, sir, I can't go along with you on that question.

Mr. Esco: We reserve an exception.

(Mr. Esco continues questioning the venire)

Mr. Esco: Thank you, gentlemen. That is all.

The Court: Are there any further qualifications?

Mr. Esco: None, your Honor.

The Court: You may strike the jury.

(The jury is struck and the selected jury takes the jury box)

The Court: Is the State satisfied with the jury?

Mr. McLeod: The State is satisfied, your Honor.

The Court: What says the defendant?

Mr. Esco: The defendant is satisfied.

(The jury is sworn)

The Court: Gentlemen of the jury, it is rather late and it is hardly possible to get started in the trial of this case, but you gentlemen constitute the jury and you have been sworn for the trial of this case. Now, during the trial of this case you will constitute a jury and you will not be permitted to separate and go your several ways. Accommodations will be provided for you this evening. In just a few minutes time I will ask the bailiff to take you to an office where you will have some outside phones, and give [fol. 49] you gentlemen an opportunity to make any needed phone calls. You will be provided your supper and breakfast in the morning, and be back here at nine o'clock. Now, gentlemen, I want to caution you, instruct you, and admonish you not to discuss this case among yourselves, because it has not been submitted to you; and you will certainly permit no one on the outside to approach you in any manner or means, directly or indirectly, in any effort

to discuss this case with you or to influence you in any way in connection with this case; and the effort on the part of any person to approach you in any manner in an effort to discuss this case or influence your judgment in this case, amounts to a contempt of Court and it will be your sworn duty to report that fact when you come back here in the morning. Mr. Nichols will be the bailiff.

The Court: Mr. Nichols, you are appointed as bailiff of this jury. I have instructed them that you will take them down there to Mrs. Houston's office and let them make their phone calls. They will constitute a jury, and you will see that they are provided lodging and food. All right, gentlemen, you may retire. We stand in recess until nine o'clock in the morning.

(Court stands in recess for the night)

(Court called to order next morning and trial begun)

The Court: Court will come to order, and you may proceed.

Mr. Esco: First, I'd like to make a motion at this time that our witnesses be brought from Birmingham sometime today.

The Court: When do you expect to use those witnesses?

Mr. Esco: I expect to have them available for consultation all during the day.

The Court: The matter of the witnesses from Birmingham was discussed last evening. There was no statement made that the witnesses would be required, in the discussion, and the statement was made that it would take sometime to get the witnesses down here and some notice would be required.

Mr. Esco: If the Court please, I came out of a three days trial at 7:05 last night and went right into another one here. At that time my case was not firmly in my mind. It is now, and I say to the Court, that I do need those witnesses here today for consultation. I have been in Court almost constantly for three weeks and have not had time to consult with them. They have been in court.

The Court: Are they material witnesses in this case?

Mr. Esco: They are character witnesses. Two of them are witnesses which may be able to produce an alibi for

this defendant. All of that depends upon the State's case, but we do need them here for consultation from time [fol. 50] to time.

The Court: Mr. McLeod, will you come back here, you and Mr. Esco?

(The Judge, Mr. McLeod and Mr. Esco retire to the Judge's chambers, and in a few minutes return to the court room)

(Mr. McLeod makes his opening statement to the jury)

(Mr. Esco makes his opening statement to the jury)

CHARLES LAYMAN WARREN, being duly sworn, testified as follows:

Direct examination.

By Mr. McLeod:

Q. What is your name?

A. Charles Layman Warren.

Q. Where do you live?

A. 5540 Court P, Birmingham.

Q. And what is your occupation?

A. Truck driver.

Q. Are you a married man?

A. Yes, sir.

Q. Do you have any children?

A. Yes, sir, I have two daughters.

Q. What are their ages?

A. Barbara, aged five; and Vicki, aged eight.

Q. And were you living in Birmingham on the night of January 17th?

A. Yes, sir.

Q. On the night of January 17th., or the early part of the morning of January 18th., did you go to work?

A. Yes, sir.

Q. About what time did you go to work?

A. We left out of Birmingham about twelve o'clock.

Q. Where were you going to, and which route were you traveling?

A. I was going to New Orleans, and was going to take Highway 11, 5, 43 and 90.

Q. Now, Highway 11, where did you get on that?

A. It comes out of Birmingham.

Q. And where do you get on No. 5?

A. It comes off—5 leads off of 11 about half way to Tuscaloosa.

Q. And does No. 5 come through Dallas County?

A. Yes, sir.

Q. And do you know where Highway 5 and Highway 80 is located, where they intersect?

A. Yes, sir.

Q. And that night, or the early morning of January 18th, as you were approaching the intersection of Highway 5 and Highway 80, did anything happen to you?

A. Yes, sir, I met an on-coming car, and when it got even with me I heard a bam-bam, and I looked over to see if I could see what it was, and I saw the hole in the door and then I knew I was shot. I realized someone had shot me, and I got the truck stopped, and another driver who was with me helped me get across the road and lay down, and he stopped the next car and had them call the ambulance.

Q. Where did that shot come from?

A. It came from the car that I was meeting.

Q. Did you see the color of that car?

A. Not as it was coming to meet me. No, sir, I didn't [fol. 51] see it.

Q. And did you see that car at any time, before or just after you were shot? Before or as you were shot or after you were shot?

Mr. Esco: If your Honor please, we object to that question.

The Court: Sustain the objection.

Q. What kind of car did you see that night?

Mr. Esco: If your Honor please, we object. It isn't shown that he saw any car.

The Court: Sustain the objection.

Q. Did you see a car that night?

A. Yes, sir.

Q. About the time you were shot?

A. You mean around the time I was shot?

Q. Yes.

A. About—oh, I would say a few minutes before I was shot, there was a white '59 Ford passed me, and it was going the same way that I was going.

Q. And how long after that was it before you were shot?

A. It was a very short time. I couldn't give you the exact minutes, but I'd say a few minutes—a matter of a few miles.

Q. Were you able to observe the automobile tag on that car?

A. The one that passed me?

Q. Yes.

A. Yes, sir, it was a 1-A tag. I didn't read the numbers on it.

Q. Did you observe the tail lights on that car?

A. No, sir, I didn't. Not that I remember seeing.

Q. Were you able to tell, from this car that you say the shot came from, were you able to tell how many people was in that car?

A. All I saw was the one fellow, that's the one driving, time that my lights hit it, and I saw it was a white car, and coming back this way I believe it was a white shirt he had on. And I just got—

Mr. Esco: If your Honor please, we object. This is not responsive to the question, and I move to strike.

The Court: Sustain. Just answer the questions.

Q. But you were able—as you heard this shot, you were able to see the color of that car, were you not?

Mr. Esco: Your Honor, we object. That is a leading question.

Q. Were you able, at the time this shot came from this car, were you able to tell what color the car was?

A. No, sir, I didn't know what color it was.

Q. Were you brought here to the hospital?

A. Yes, sir, brought here to the Vaughan Memorial Hospital.

Q. How long did you stay there?

A. From January 18th., about 3:45 in the morning until January 30th., I believe it was, about one p. m. that evening.

Q. Have you recovered from that gun shot wound?

A. No, sir, not completely.

Q. And what is the condition of your lung at the present time?

[fol. 52] Mr. Esco: If your Honor please, we object.

Mr. McLeod: I'll withdraw it. I will have the doctor later on.

Q. And you don't know who shot you, do you?

A. No, sir.

Q. But you were shot?

A. Yes, sir, I was shot.

Q. And you were shot in Dallas County, Alabama?

A. Yes, sir, I was shot in Dallas County.

Mr. McLeod: Your witness.

Cross examination.

By Mr. Esco:

Q. Mr. Warren, what time did you go to work that night?

A. We left out of Birmingham right at twelve o'clock.

Q. What time did you go to the terminal?

A. I got over there about—oh, 10:30 or 10:45, I don't know exactly. Somewhere between that time.

Q. And how long did you stay around the terminal?

A. I guess it was an hour before we left down there. Something like that.

Q. Will you describe where the terminal is located, and how it is located?

A. The address of it is 5060 Third Street West, and on the east side of us is the Frisco Railroad yards, and goes down a kind of hill and flattens out, and west of us Pan-Am

American Oil has got some big tanks there, and goes down in that flat bottom there.

Q. Would you say that is a dark and deserted area at this time of night?

A. No, sir, they have some big street lights at the bus stop there. And the building, on all corners we have spot lights that lights up every trailer. And on all of the corners on the outside of the buildings. We don't have a night watchman, and we have to have some light there. We can see all around. Now, on the back side you might not, but on the street you can see to the end of our terminal building.

Q. Did you go into that terminal, under those lights, and walk up on the dock and around the dock?

A. Well, I know I had to go under some lights. Let's see—where did I park my automobile—the spot lights extend out some, and I had to go under some of them.

Q. Now, how long did you walk around the terminal there under those lights, in and around the terminal?

A. All of the men was working and every light we had was on that night, and we had plenty of light. I probably made a trip down to the dock, and I was sitting there. I might have made a trip down there to talk to all of them a little bit. Before leaving, most of that time I stayed in the office, waiting on—

Q. (Interrupting) But you were around and outside, and up and down the dock and under the lights and so forth, were you not?

A. I don't believe I ever did go out in the yard.

Q. But you were around the dock, out in the open.

A. No, you can't see. Trailers is flush with the doors [fol. 53] there. You would nearly have to come up on the dock, come up and look between the trailers to have seen me if I had been out there. If anybody had come up, have a hard time seeing me.

Q. Where did you park your car?

A. I believe—well, I believe—well, I don't know where I parked, whether on the east side of the terminal or on the west side of the terminal. To the best of my recollection, I believe it was on the east side of the terminal up against the building.

Q. But you had parked your car there somewhere around ten o'clock, and walked out of your car.

A. Yes, around in that neighborhood, best I remember the time.

Q. How far did you walk to get into the terminal building?

A. The best I remember where I parked my car, it would be something like two car lengths, around two other cars in there besides the terminal. Right up to the terminal. Very few feet.

Q. But you were around that terminal something like two hours, is that right?

A. Something like an hour and fifteen or twenty minutes. And I do know—about an hour and fifteen minutes.

Q. Mr. Warren, are you a member of the union?

A. Yes, sir.

Q. What union are you a member of?

A. Local 612 Teamsters, Birmingham.

Q. Is that the same union as the members involved here?

A. I don't know.

Q. Is that the union of which Mr. Sam Webb is president?

A. Yes, sir.

Q. How long have you been a member of that union?

A. January 16, 1949.

Q. About thirteen years.

A. Yes, sir.

Q. During that time have you been involved in union activities, strikes, and strikes in general?

Mr. McLeod: I'm going to object to that question, your Honor.

The Court: I don't see the relevancy.

Mr. Esco: If your Honor please, we are simply going to show that he was a union member and that there was a strike going on, and he knew it. Some of the things that have been published here—I've got to get into it.

Mr. McLeod: He's too far afield for this case.

The Court: I don't see the relevancy of it. If you've got some theory as to the relevancy of it—

Mr. Esco: We will later connect it up, of course. We expect him, as he did in the previous case, to introduce a purported confession in which it is stated about union activities and things that happened, and why, involving union members, and things of that sort.

Mr. McLeod: You heard my statement, your Honor. I don't think there is a thing in there—there was one thing in there, and you had us delete it.

The Court: Come out here with me.

(The Judge, Mr. McLeod and Mr. Esco retire to the Judge's chambers, for a short time, and then all three return to the court room)

[fol. 54] The Court: Sustain the objection to the last question.

Mr. Esco: We except, if you please.

Q. After standing around the dock and loading, did you subsequently take out a truck, Mr. Warren?

A. At twelve o'clock I did.

Q. You took out a truck and trailer, did you not?

A. Yes, sir.

Q. Describe that truck and trailer, if you will, please.

A. Tractor 324, a White diesel and pulling a Bowman trailer.

Q. Is that a Bowman Transportation Company truck and trailer?

A. At that time it was not. We had an interchange agreement with West Brothers.

Q. I see. But it had Bowman written on it, didn't it?

A. Bowman written on it.

Q. Now, what time did you pull out from the terminal, Mr. Warren?

A. It was right around twelve. I couldn't give you the exact time. It was a little after twelve, or something like it. Very close to twelve a.m. that night.

Q. Why did you wait so late at night to pull out?

A. There was—

Mr. McLeod: (Interrupting) Your Honor, I'm going to object to that question. The time they checked him out is

immaterial. He is going too far afield in this thing, bringing in things that are immaterial, why did he leave at twelve o'clock—

Mr. Eseo: Just because Mr. McLeod knows the answer to it—

The Court: If he can connect it up—. I frankly don't see the relevancy of it, but I overrule the objection, and he can answer, if he knows.

A. Well, it was one driver coming up out of Montgomery going to New Orleans, which lived in New Orleans, and he'd be an extra man, is one thing. Edward Gorff, the other driver, was going to New Orleans, and he was a Birmingham man. He and I was the only two Birmingham men going to be in New Orleans the next day. And Edward had came in late that afternoon and was sleeping, and I had to bill some more time off before I could go. And two drivers in the office, and I sit around, just breezed around with 'em. Well, I came up from Montgomery with Paul Pellegreen (reporter not certain of this proper name) and we all—and he was going to run with some of them.

Q. Did you leave that area in the company of another truck, running together?

A. I would say there was somewhere around eight or nine that left there at the same time.

Q. Now, where did you—which direction did you head out from there?

A. Out of Birmingham!

Q. Yes.

A. Came out 11 south, hit No. 5 half way down between Tuscaloosa and Birmingham.

Q. Were you traveling convoy with those eight or nine trucks all the time?

A. We tried to stay pretty good ways apart so automobiles could go by.

Q. How far did you run in convoy?

A. We was all together at Centreville. I'll say not all of us, I think the biggest majority of us stopped there.

[fol. 55] Q. How many of you stopped at Centreville?

A. I don't know how many of us was in there. A couple of those small tables full of us, with three or four at a table.

Q. I mean how many trucks and trailers?

A. I didn't count them.

Q. Do you have any estimate?

A. Yes, sir, I'll say around seven or eight of us in there anyway.

Q. Which meant there were seven or eight trucks and trailers there?

A. Of ours, yes, sir.

Q. How many trucks had Bowman written on them?

A. It was two of them had Bowman written on 'em. Just two.

Q. Now, where did you stop exactly in Centreville, Mr. Warren?

A. I stopped at the Twix and Tween Cafe.

Q. Twix and Tween. What type of area did you stop in? Do they have a parking area for trucks?

A. Yes, sir, it has a big paved parking lot all the way around the building.

Q. Is that a lighted parking lot or a dark parking lot?

A. Where my particular truck was sitting it was lit up. There's a little station there and it had lights on.

Q. Were you down behind the building?

A. Yeah, but you see there's a drive-way between the building and cars.

Q. Is that a fairly deserted area at that time of night?

A. No, sir, that time of night there is a lot of trucks going in and out. Just lots of them. Just every few minutes there.

Q. All right, sir. How long did you stay in Centreville?

A. I can't give you the correct time, but I think fifteen, twenty minutes, maybe a little longer or less—I don't know.

Q. What time would you say you pulled out of Centreville?

A. I don't know that. I really don't know it.

Q. You don't know what time of night this was that you stopped there?

A. No, but you can figure it out pretty close. I left out and came straight down there. I left Birmingham somewhere close to twelve or just a short time thereafter.

Q. And how far is it to Centreville?

A. About fifty miles, I guess.

Q. About fifty miles. And you drove from Birmingham—north Birmingham, isn't it, where your terminal is?

A. No, it's on the west side of town there. You just have to go right across the hill out here on Third Avenue and you come right on out there. At that time of night, twelve o'clock, you don't have no trouble coming out of town.

Q. And you drove—you left out about twelve o'clock and you got to Centreville about what time?

A. Well, it was a little after one or something like that, I'd say. If no trouble it takes, in a loaded truck, a little over an hour to make that at that time of night.

Q. How many miles an hour do you have to average to get from the docks to where you stopped in an hour and fifteen minutes?

A. I never figured the time out in mileage, and time up. [fol. 56] Q. You don't have any idea how fast you were traveling that night?

A. No. The speedometer didn't work and I just don't know.

Q. How did you gauge your speed that night?

A. Well, you could tell pretty well the way the other trucks were traveling. And me being an extra man, I couldn't tell hardly. If I got with one of them, and run with him awhile.

Q. Well, about what were you doing?

A. I'd say we was running around fifty, or coming off a hill sometimes fifty-five.

Q. Now, after you left Centreville, what highway did you take?

A. Still on 5.

Q. Still on Highway 5. And how fast were you running at that time?

A. I don't know. I really don't. I didn't have a speedometer.

Q. Were you still in convoy with other trucks?

A. No, sir, they all done pulled out. We let them get to the top of the hill two at a time. And me and one other one were kind of in convoy. We were the last ones to leave.

Q. Now, you say you left two by two. Did you run in convoy with another truck from there on?

A. Yeah, we more or less sort of run together. We were going to New Orleans and he was a Birmingham man, and

I went on with him. When we left there Gorff was the lead man. When we left there he pulled out first.

Q. Gorff went first. All right. Now, you say that you have been judging speed by the speed of other trucks. How fast were you going, judging by Gorff's truck?

A. I say that you can judge them that way. I didn't ask them at Centreville how fast they registered. Still I would say fifty to fifty-five miles an hour—by me just guessing without a speedometer.

Q. Now, how long had you been driving at the time that you were shot?

A. How long that night?

Q. Yes, sir.

A. Well, from the time we stopped at Centreville—I don't know exactly what time I was shot. I didn't look at my watch or nothing to give the time, but I had driven from Birmingham to the point that I got shot except for the time I stopped at Centreville.

Q. Do you know approximately how many miles you had run from Centreville at the time you were shot?

A. I believe it was—I figured it up approximately, about eighty-nine miles.

Q. You had traveled eighty-nine miles from Centreville or from Birmingham?

A. From Birmingham.

Q. From Birmingham. How far—you said you were in Centreville at approximately one-fifteen and stayed there about twenty minutes—

A. Might have been longer or shorter, I don't know.

Q. Which made it something to two at that time. And you say you do not know what time you were shot.

A. No. No. I wasn't thinking about looking at no watch.

Q. You have not previously testified as to what time it happened?

A. No. I could guess though.

[fol. 57] Q. Well, what would be your guess?

A. I'd say around two-thirty or something like that.

Q. Around two-thirty. So, saying that you left Centreville at something like a quarter of two, that gives you forty-five minutes between Centreville and the point where you were shot.

A. Something like that, more or less.

Q. About how many miles would you travel during that forty-five minutes?

A. Figuring it out—I don't know exactly how far it is from Centreville to Birmingham.

Q. Now, how did you know when you arrived in Dallas County?

A. I didn't know it at that time. I probably crossed the line and I didn't notice it. I know where I was shot and I have been back over there, and I seen it was definitely in Dallas County.

Q. You have been back over there since, but you didn't know that that night?

A. At that particular time, no. I didn't care what county I was in at the time I was shot.

Q. Now, at this particular time that you were shot, how fast were you going?

A. I don't know. I'd say around forty-five miles an hour, to my best guess. According—if we was just guessing. I'd slowed up some, and in my mind I was trying to hold to the speed law, and I'd slowed down for Gorff to come on and pass me and be in the lead.

Q. Why was he supposed to pass you?

A. Well, there's a truck stop south of 80, and him being an older driver, I figured if we had time to stop for coffee he'd know more about the time we had to make to get to New Orleans.

Q. When did you pass him? He left Centreville ahead of you.

A. I passed him—after we hit the new road and left Centreville, and it was on a hill over there, and I pulled around and got around him on that hill.

Q. Any particular reason?

A. The only reason, he was holding me back on that one particular little hill and I pulled on around him.

Q. Now, during the trip between Birmingham and Twix and Tween, how many cars did you see?

A. Well, I have no way of telling. Lot of cars on the Birmingham road.

Q. Did you notice any '59 white Ford Galaxie automobile?

A. I didn't notice hardly any. I can't tell you what kind I noticed—not to my recollection.

Q. All right. Now, between Centreville and the time you were shot, how many cars did you pass?

A. From Centreville down to the time I was shot, I believe just one car was all of the automobiles that had passed us. This white car that I have mentioned before I believe was the only automobile that passed us.

Q. And you recognized it as being what kind of car was that?

A. A '59 white Ford.

Q. And you can recognize a '59 white Ford at night and you're driving forty-five miles an hour. How fast was it driving?

A. I guess at the time he passed me I was traveling about fifty miles an hour.

Q. And he had to pass two trucks, did he not?

A. Had to pass two!

Q. Yes. To get by you.

A. I'm just one truck, to pass me. To pass me is all I know about.

[fol. 58] Q. Yes, sir, but you had a truck behind you, didn't you?

A. Yes, sir, but he was way behind me at that time. About 300 yards.

Q. He had to pass the other truck and then come past you, is that right?

A. I suppose he did. I suppose he had to pass lot of them back there.

Q. How how far back was this other truck behind you?

A. I wouldn't know definitely. 300 yards at least.

Q. He was 300 yards behind you at the time you say you saw a white Galaxie Ford pass you. Is that right?

A. I didn't say it was a Galaxie, but that's the kind it was.

Q. You knew that that night?

A. I knew it was a '59 white Galaxie. My lights was shining on it, and I could tell it was.

Q. How fast was it driving?

A. I have no way of telling.

Q. You have driven automobiles and trucks for a good many years, have you not?

A. Yes, sir.

Q. And you have observed speed?

A. Yes, sir.

Q. And you fairly well know speed, do you not?

A. I'm no expert at it.

Q. But you are generally acquainted with speed, are you not?

A. Yes.

Q. In your best judgment how fast was he driving?

A. Well, if I was going about fifty—he wasn't going too much faster. I'd say somewhere around between fifty-five and sixty when he passed me at that time.

Q. He went past you just a little faster than you were going, and pulled in so close behind that you could see his tag. Is that true?

A. I don't remember the fellow over pulling back over on the right side right in front of me. I don't remember that. He went on out on that side.

Q. Now, for how long could you see him?

A. I don't remember that.

Q. Well, give us an estimate.

A. You could see a long ways, but as far as him registering on my mind, I done forgot him—I was thinking of people coming on down—

Q. But you did notice him enough—him on the left-hand side of the road—that he passed you in a white Galaxie Ford, and you noticed the tag number. So he could not have been going very fast, could he?

A. At the time I saw those car headlights back there, as he was passing those trucks back there, I thought it was the highway patrol, and naturally I was keeping an eye on them until they got up beside me—most any car, I watch for it until it gets by me. And when he passed me I saw it was a white car, and I just noticed it was a pretty shiney car and had a Jefferson County license. And I went back to concentrating on getting on down.

Q. At that time of night and traveling at those speeds, could you tell the difference between a white and a cream colored automobile?

A. I think you could, if you are not color blind.

Q. Well, assuming that you aren't color-blind, did you make up in your mind that night that it was a white automobile, or later?

A. I was in the ambulance. The officers got over there, and I was laying on the ground over there and I couldn't move. And the ambulance come on, and—

[fol. 59] Q. (Interrupting) Just answer my question, please, sir.

A. I'm getting up to it, if you will let me.

Q. Let's don't get up to it. Let's just answer it as is.

A. Yes, sir, I know it was the one that went by me. Yeah.

Q. Did you describe it to anybody that night, that it was a black Chevrolet with a white top?

A. No, sir.

Q. Did you hear sometime the next day that the police were chasing a black Chevrolet with a white top?

A. No, sir, I didn't know anything the next day.

Q. Now, what else did you observe of this white Galaxie Ford? Did you notice anything else?

A. Well, as I was fixing to tell you, the man driving, I noticed him.

Q. As he passed you?

A. As he got out in front my lights were shining—

Q. As he passed you, you only saw one man?

A. One man driving, that's all I saw.

Q. Now, the automobile that the shot came from, which you were injured, came up the road facing you, didn't it?

A. Right.

Q. And how fast was it driving?

A. I don't know.

Q. And were you able to observe anything about that car?

A. He had his lights on bright, that's about the only thing, and I was concentrating on the road.

Mr. Esco: I believe that's all.

Mr. McLeod: Come down, Mr. Warren.

EDWARD GORFF, being duly sworn, testified as follows:

Direct examination.

By Mr. McLeod:

Q. Mr. Gorff, what is your name?

A. Edward Gorff.

Q. What is your occupation?

A. Over-the-road truck driver.

Q. And where do you live?

A. Midfield, a suburb of Birmingham.

Q. And who do you work for?

A. West Brothers Motor Express.

Q. On the night of January 17th, or the early part of January 18th, did you go out on a run that night?

A. Yes, sir.

Q. And did anybody go along in another truck with you from Birmingham?

A. Yes, sir.

Q. Did you see Charles Warren that night?

A. Yes, we were running together.

Q. Was anyone in the truck with you?

A. No, sir.

Q. Was anyone in the truck with Charles Warren?

A. No, sir.

Q. What route did you take coming down to Dallas County?

A. Came out of Birmingham on Highway 11 to the junction of 5, and then took 5 to Centreville and on down.

Q. Do you remember a disturbance that took place just before you got to the intersection of Highway 5 and 80? Were you there when that happened?

A. Yes, sir.

[fol. 60] Q. And in what position were you and Mr. Warren traveling?

A. He was in front.

Q. And who was behind?

A. Warren was in front and I was in the truck following him.

Q. And did you attempt to pass him?

A. Well, I was fixing to pass him and stop and tell him let's eat before we got way down the road.

Q. And did something happen to prevent you from passing him?

A. Yes, sir. We met a car.

Q. Now, previous to that, had an automobile passed you going south?

A. Yes, sir.

Q. Did you get a look at that car?

A. Yes, sir.

Q. What color was it?

A. White.

Q. What make and model?

A. '59 Ford Galaxie.

Q. Did you observe the tail lights on that Ford?

A. Yes, sir.

Q. How many tail lights did he have?

A. Had one burning and one was burned out.

Q. Which one was burning and which one was burned out?

A. The right one was burned out and the left was shining.

Q. And had you gotten close to him—did you hear a shot that night?

A. Yes, sir.

Q. And had you gotten up close behind Warren when that happened?

A. Yes, sir.

Q. Approximately how close were you to him?

A. Approximately sixty-five or seventy yards.

Q. And just tell us what you saw and heard and observed there, just when you got to Highway 80.

A. We met this car. And I was fixing to pass him and I saw a car come over the hill and I fell back behind him. I was getting up close enough so I could stop him at the junction, and the car lights blinded me and I pulled back over to the right side of the road as far as I could to keep the lights from blinding me so I could see when he got around, and I heard this shot, and Warren put on brakes and pulled off to the side of the road. I was next, so I pulled off too, to see what was wrong.

Q. The car that was meeting you, do you know whether his lights were on bright or dim?

A. Well, four of them shining. I imagine they were on bright.

Q. And after you heard this shot, did that car have to come on then by you?

A. Yes.

Q. Did you look at it?

A. Well, I seen it was a white car is all I could tell, because the lights were on bright, and that's about all the time I had to see—close together.

Q. And you could tell what color it was?

A. Yes, sir.

Q. What color was it?

A. It was a white car.

Q. And could you tell what make of car at that time?

A. No—no, I couldn't. I could tell it was a white car. I knew it was a late model car though, because it had four headlights.

Q. And when this car first passed you going south, did you observe the tag number?

A. Yes, sir.

Q. And what was the prefix on there? What county was it from?

A. Jefferson county.

[fol. 61] Q. You said you stopped your truck after this shooting took place?

A. Yes, sir.

Q. What did you do then?

A. I got out and went to see what was wrong with Warren, because he'd had trouble. He was always out of the truck just as soon as he'd got stopped and he hadn't got out of the truck yet. So I went up to see what was wrong with him.

Q. And what was wrong with him?

A. He had been shot.

Q. What did you do then?

A. I got him out of the truck and—

Mr. Esco: If your Honor please, we object to that. He can say that the man had been shot, and anything else is prejudicial. Any treatment prescribed by this man or anything else has nothing to do with the assault here.

Mr. McLeod: All part of the res, your Honor.

Mr. Esco: Well, we're proving the gun shot and that's all. Anything else is prejudicial.

The Court: Overrule.

Mr. Esco: We except, if you please.

Q. Answer.

A. I got him out of the truck and laid him on the side of the road, and got my coat and his coat and a sweater, and tried to make him warm until I could make it.

Mr. Esco: We object. The question has been answered.

Q. Just what you did.

A. Well,—

Mr. Esco: (Interrupting) If your Honor please, we object. The question has been answered. We object to any further answer.

Mr. McLeod: Well, you don't know whether he is through. He's just telling us he got him out, and you don't know whether he is through. I asked him what did he do.

Q. Go ahead.

Mr. Esco: I insist there must be some limit on what he did subsequently. For how long? Six weeks?

Mr. McLeod: I am asking what he did that night, Mr. Esco.

Mr. Esco: Well, we object on the grounds that—

The Court: (Interrupting) Yes, sir, I sustain the objection to what he did that night.

Q. Let me ask you, when the shooting took place did you go to the truck?

A. Yes, sir.

Q. What did you do when you got to that truck?

A. I opened the door and helped him out, laid him on the side of the road, and covered him up, and waited for somebody to come along, and I prayed while I waited for somebody to come along. I was afraid.

Mr. Esco: We object to that, the statement, "I was afraid". It is highly prejudicial.

The Court: Overrule.

Mr. Esco: We except, if you please.

Q. Did you get help for him?

A. No. Another truck came along and he called help, [fol. 62] because I wouldn't leave him.

Q. And was he brought to the hospital?

A. Yes, sir.

Q. How?

A. By ambulance.

Q. The next afternoon did you go to Anniston, Alabama, with Captain Thornton of the Alabama Highway Patrol?

A. Yes, sir.

Q. And where did he carry you?

Mr. Esco: We object to all this. This is too remote from the scene. Not part of the res and has nothing to do with this case.

The Court: Overrule at the present time.

Mr. Esco: We except, if you please.

Q. Where did you go to in Anniston?

A. Highway Patrol office.

Q. Did you see an automobile there?

A. Yes, sir.

Q. Describe the automobile that you saw there.

Mr. Esco: We object, your Honor. This is too remote from the scene of the res. The next afternoon, has nothing to do with this case whatsoever, what he saw the next afternoon some hundred miles or more away.

The Court: Overrule.

Mr. Esco: We except.

Q. Go ahead.

A. I saw a white '59 Galaxie Ford.

Q. Was that the same Ford you saw the night before?

Mr. Esco: Your Honor please, we object.

Q. In your opinion.

Mr. Esco: If he can identify it in some way. And we also object on the ground it is too remote.

The Court: Overrule.

Mr. Esco: We except.

A. I would say it was the same Ford. Only difference it had a different kind of tag on it, had an Etowah County tag on it.

Q. And what is the prefix of Etowah County? Do you know?

A. Thirty-one.

Q. With the exception of the tag, in your opinion it is the same vehicle?

A. Yes.

Q. Mr. Gorff, the night before when you saw that automobile did you see anything in the back of that car?

Mr. Esco: If your Honor please, we object.

Q. When it passed you down there.

Mr. Esco: We object. It has nothing to do with this assault whatsoever.

The Court: Overrule.

Mr. Esco: We except.

A. I saw a black object in the back of the car. I couldn't tell what it was.

Q. And the next day in Anniston, when you saw this Ford that you say in your opinion was the same one, did you see [fol. 63] that object still in the back there?

A. Yes, sir.

Q. And at that time you could see what it was?

A. Yes, sir.

Q. What was it?

A. An umbrella.

Mr. McLeod: Your witness.

Cross examination.

By Mr. Esco:

Q. You described an automobile that passed you and had a 1-A tag on it as a white Ford. Is that correct?

A. Yes, sir.

Q. Did that car do anything to you?

A. Not going.

Q. Or to anybody?

A. No, sir.

Q. You have also described an automobile that passed you going the other way, from which a shot came. Is that correct?

A. Yes, sir.

Q. Did you see a tag on that automobile?

A. No, sir.

Mr. Esco: That's all.

Mr. McLeod: Come down, Mr. Gorff.

J. E. WILLIAMSON, being duly sworn, testified as follows:

Direct examination.

By Mr. McLeod:

Q. What is your name?

A. J. E. Williamson.

Q. What is your occupation?

A. State Highway Patrolman.

Q. And were you in that capacity during the month of January, 1962?

A. Yes, sir.

Q. On or about January 18, 1962, did you have occasion to be out on Highway 11?

A. Yes, sir.

Q. Where were you on that occasion, Mr. Williamson?

A. About six miles south of Bessemer.

Q. And what were you doing, Mr. Williamson?

A. Patrolling the highway.

Q. And did you set up a road block?

A. Yes, sir.

Q. Where did you set up that road block?

A. Intersection of highways 5 and 11 in north Bibb County.

Q. And did you check any cars that night?

A. Yes, sir.

Q. Did you see Mr. Douglas that night?

A. Yes, sir.

Q. Approximately what time did you see him, Mr. Williamson?

A. About five a. m. in the morning.

Q. Which way was he coming from when you saw him?

A. Toward Tuscaloosa.

Q. Going toward Tuscaloosa or coming from Tuscaloosa, which?

A. Coming from toward Tuscaloosa.
[fol. 64] Q. Coming from toward Tuscaloosa.

A. Yes, sir.
Q. When this automobile arrived at the intersection, which way did he go then?

A. Turned down Highway 5 on south.
Q. Did you stop him?

A. Yes, sir.
Q. Did you check his car?

A. Yes, sir.
Q. Who was driving that car?

A. Olen Loyd.
Q. Did you see Mr. Douglas in there?

A. Yes, sir.
Q. Where was he sitting?

A. Sitting on the front seat with him.
Q. Did you check that car?

A. Yes, sir.
Q. Did you see anything in that car?

A. Yes, sir, I saw some clothing in the back seat.
Q. Did you check the trunk of that car?

A. Yes, sir.
Q. What did you see there?

A. Well, I saw a shotgun case and shell box and two lights mounted on a board and some wires.

Q. How did you know—you say one of them was named Douglas. How did you know his name was Douglas?

A. Checked his Social Security card.
Q. You testified there were some shells back there. Did you—

Mr. Eseo: We object to leading questions.
Mr. McLeod: That's not a leading question, your Honor.

That's not leading.
I said, "You testified—" and then my question comes thereafter.

Q. Did you testify a while ago that you saw some shells?
A. I saw a shell box.
Q. Did you see what type of shells, what make?

- A. The brand on them was Peters high velocity.
- Q. Did you stop these men? I mean, did you hold them?
- A. Well, we checked them for several minutes, yes, sir.
- Q. What did you do then?
- A. We wrote down the information and turned them loose.
- A. After that automobile drove off—well, first I'll ask you, which way did it go then?
- A. It headed on south on Highway 5.
- Q. As that car drove off, did you observe the back of it?
- A. Yes, sir.
- Q. Did you observe the tail lights?
- A. Yes, sir.
- Q. What was their condition?
- A. One tail light was out.
- Q. Which one?
- A. I don't recall which one was out.
- Q. What kind of car were they driving?
- A. Driving a '59 white Ford.
- Q. Did you later on see that car again?
- A. Yes, sir.
- Q. Where did you see it?
- A. Over in Anniston.
- Q. That same day?
- A. Yes, sir.
- Q. The car you saw in Anniston, was that the same car you saw at the intersection of Highways 5 and 11 that Mr. Douglas was in?
- A. Yes, sir.

Mr. McLeod: Your witness.

[fol. 65] Cross examination.

By Mr. Esco:

Q. Mr. Williamson, how long were you on that roadblock?

A. We were on it, sir, from about 3:45 until about seven o'clock.

The Court: From when?

The Witness: From about 3:45 to about seven.

Q. How many automobiles did you stop during that period?

A. I don't recall exactly how many we did stop.

Q. Did you keep detailed notes on them as you did on this one?

A. Not on all of them.

Q. Do you have an estimate of how many cars you stopped?

A. No, sir, that would be a pure guess.

Q. Would you not also be afraid to say that you didn't see other white Fords that night?

A. I don't recall another one.

Q. You don't recall any more. Did you make any notes that night on the type shells on that box?

A. You mean the brand?

Q. Yes, sir.

A. Yes, sir.

Q. You made notes on it?

A. Yes, sir, I made a note on the brand on it, that I found on the box. Yes, sir.

Q. You made a note on your pad, on your statement?

A. Yes, sir.

Q. Do you have that with you?

A. I have the statement, yes, sir, typed out.

Q. Do you have a note on there regarding the type brand shells in it?

A. (Witness hands said typed statement to Mr. Esco.)

Q. Now, when was this prepared, Officer?

A. This was prepared a few days after that.

Q. Prepared a few days after this occurred?

A. Yes, sir, this was from my notes. Yes, sir.

Q. This was prepared for your testimony also, wasn't it?

A. Yes, sir, on my own request.

Q. Now, did you make any notes in your book as to that tail light being out?

A. I don't recall whether I did or did not.

Q. You did say the number of cars you saw and stopped that night were numerous?

A. Sir, that was about five o'clock, and there were people going to work.

Q. Yes, sir. And you'd say quite numerous?

A. Yes, sir.

Q. Would you say as many as 200 cars?

A. No, sir, I wouldn't say 200.

Q. You wouldn't think that many passed?

A. No, sir.

Q. Would you say it was 100?

A. I doubt if it was a hundred.

Q. Would you say it was seventy-five?

A. Possibly.

Q. Possibly seventy-five. Now, describe some of the other automobiles that stopped there, that you stopped that night, if you will for us. Particularly Fords.

[fol. 66] A. Well, we didn't write down the color of the cars. We wrote down the tag numbers.

Q. So you don't know whether the men who showed you their driver's and Social Security numbers were in a white Ford automobile or not, do you?

A. Yes, sir, I do.

Q. You said you didn't make any note of it that night that it was white.

A. Well, we had a call on a white Ford, sir, and I distinctly remember that one.

Q. How's that, now?

A. We had a call on a white Ford and I distinctly remember that one.

Q. You mean they called you to stop it?

A. Yes, sir.

Q. Weren't you stopping all cars?

A. Yes, sir, we were stopping all cars. Traffic was slow going south and more traffic going north.

Q. Did you detain this white Ford any longer than any other car?

A. Yes, sir, we did.

Q. Did you detain it longer than the average car you stopped?

A. Yes, sir.

Q. Why?

A. Well, because it was a white Ford and two men were in it, and we had a call on a white Ford.

Q. You had already had a call to be on the lookout for a white Ford with two men in it?

A. They didn't say two men, no, sir.

Q. How many in the car?

A. They didn't say. Just said a white Ford.

Q. Just a white Ford. Mr. Williamson, you've had how many years experience as a highway patrolman?

A. Going on sixteen years.

Q. Sixteen years. During that time you have learned a lot of procedures, haven't you?

A. Well, I've learned some; yes. I wouldn't brag about it.

Q. I'm not attempting to browbeat you, because I think the Highway Patrol is the finest police organization in the State of Alabama. I'm sincere about that. You are well trained. You have good training officers, have you not?

A. Yes, sir, we have some good officers.

Q. And you make proper reports and proper police procedures, do you not?

A. Yes, sir.

Q. And at all times you follow proper police procedure, as you have learned to do for over fifteen years.

A. We try to.

Q. And you as a highway patrolman with sixteen years experience in the Highway Patrol, and with your training, satisfied yourself, did you not, that these men were not the ones guilty of this shooting?

A. No, sir, we wasn't satisfied.

Q. Why? Why did you let them go?

A. Because we didn't have sufficient information. The information we had, we thought the man was shot with a rifle.

Q. Mr. Williamson, who did stop these men and take them into custody?

A. A policeman over at Ohatchee.

Q. Do you know if you have talked to that policeman since you've been around this week? Do you know him and talked to him about it?

A. Yes, I've talked to him, but not too much about this. [fol. 67] Q. Have you talked to him about his experience, his age?

A. Well, I've talked to him.

Q. Is it nearly as great as yours?

A. Well, I wouldn't want to say about that.

Q. Well, has he been in law enforcement anything like as long as you have?

A. I don't know, sir.

Q. When he arrested them, did he stop them and arrest them because they had a rifle?

Mr. McLeod: Your Honor, I'm going to object to that unless this man can testify he was up there with him.

Mr. Esco: Your Honor, please, I'd like to be heard here. I have asked this man on cross-examination why he didn't, with his training and his instincts as a police officer.

The Court: Will you read it, Mrs. Bailey, read the question back.

Court Reporter: (Reading from her notes) "When he arrested them, did he stop them and arrest them because they had a rifle?"

The Court: Sustain the objection.

Mr. Esco: We except, if you please.

Q. Have you talked to that policeman yourself about the incident and how and why/he stopped them?

A. No, sir, not exactly.

Q. Not exactly.

A. He volunteered some remarks.

Q. Mr. Williamson, during your training and experience and working with the Highway Patrol, don't you develop a pretty strong instinct of suspicion?

Mr. McLeod: I object to that question, your Honor.

Mr. Esco: I think that's a very good question, a very frank question.

The Court: "Instinct of suspicion", define what that would be, Mr. Esco.

Mr. Esco: Your Honor, as a highway patrolman, working in it for a number of years, like any law enforcement officer, or any lawyer, or anybody else, he develops instincts, knowledge, that's not known by the average person; and he is able to recognize things and sort out things and seek out things, that the average citizen wouldn't do; and I'm cross-examining him on that.

The Court: I'll let him answer the question.

The Witness: Will you repeat it again?

Q. During your years of experience in the Highway Patrol and your training in the apprehension of people from time to time, don't you develop an instinct as a police officer for looking for evidence?

A. To some extent, yes, sir.

Q. And the night that you stopped this car that you are talking about, you were looking for evidence to connect these people up with the crime that had been reported, weren't you?

A. Yes, sir.

Q. And at that time you found no evidence that did connect them up. Is that correct?

[fol. 68] A. Well, I couldn't say that.

Q. But you didn't arrest them, did you?

A. No, sir, we didn't find the rifle.

Q. Now, I'll ask you this. You said that you stopped a white Ford automobile and somebody showed you a Social Security card. Was it this man, this defendant?

A. Yes, sir.

Q. And you recognize him? You recognize him out of all the seventy-five cars you stopped there that morning?

A. Yes, sir.

Q. You say there were some clothes in the back seat of the car?

A. Yes, sir.

Q. What sort of clothes were those?

A. I don't recall. Just a jacket or two. I don't recall exactly what kind of clothes.

Q. Did you look in the front seat and front floorboards, and in the back seat and the back floorboards?

A. Yes, sir.

Q. You looked in the trunk, did you not?

A. Yes, sir.

Q. What did you find there?

A. Well, just a shell box, and the box was inside a brown paper sack. And a gun case with a gun in it.

Q. What type of gun was that?

A. Well, I asked Loyd to open it up, and he took the gun out and showed it to me. It was a pump shotgun.

Q. It was a pump gun. Did you see in that car, or about that car, a Winchester twelve gauge model 50 shotgun?

A. I don't recall. I just saw a shotgun. I didn't notice the brand.

Q. Did you see an automatic shotgun?

A. No, sir.

Q. You didn't see an automatic shotgun.

A. No, sir.

Q. Did you see anything at all suspicious about these men?

A. (No answer.)

Q. I withdraw that question. What else did you find in that car?

A. Well, the lights on a board with some wires.

Q. You found some lights on a board.

A. Looked like direction lights, round lights.

Q. Now let me ask you this. When did you first notice the tail light was out on the car?

A. As it was going away from us, going south.

Q. Now, this was about five o'clock in the morning and you were searching the car. Was it dark?

A. Yes, sir.

Q. When they stopped at your roadblock, were you standing in front of this car?

A. No, sir, I was standing at the side.

Q. At the side.

A. Yes, sir.

Q. And did you approach the driver's side or the other side?

A. The driver's side.

Q. You approached the driver's side?

Q. Yes, sir.

Q. And you examined his credentials, his driver's license?

A. Yes, sir.

Q. And what did you do next, sir?

A. I went around and checked the identity of the other men.

Q. You went around the car?

A. Yes, sir.

Q. Front or back?

A. I went around the back.

[fol. 69] Q. Now, at that time, did the man have his lights on or off?

A. Had his lights on.

Q. Now, at that time did you see a tail light out?

A. I didn't particularly notice at that time.

Q. I see. Don't you believe if that tail light had been out you would have noticed it at that time, and not after you learned later on that these men were charged with something and had a tail light out? Isn't that when you remembered you saw it going off with a tail light off?

A. No, sir, I'm positive I—

Q. (Interrupting) Do you remember any other cars going off that night with a tail light off?

A. I don't recall it. Not going in that direction.

Mr. Eseo: I believe that's all.

Mr. McLeod: That's all, Mr. Williamson.

The Court: We will take a few minutes recess.

(Court stands in recess for a few minutes, then called to order and trial resumed)

AARON TEAGUE, being duly sworn, testified as follows:

Direct examination.

By Mr. McLeod:

Q. What is your name?

A. Aaron Teague.

Q. What is your occupation?

A. Policeman.

Q. Where?

A. Ohatchee.

Q. Where is Ohatchee located, Mr. Teague?

A. Northwest corner of Calhoun County.

- Q. How close to Anniston?
- A. Approximately eighteen miles.
- Q. And were you on duty there the eighteenth day of January?
- A. Yes, sir.
- Q. Did you have occasion to stop two men there that day? Or did you stop two men?
- A. Yes, sir.
- Q. Who did you stop?
- A. Mr. Loyd and Mr. Douglas.
- Q. And how were they traveling?
- A. In a '59 Ford.
- Q. What color?
- A. White.
- Q. And did you take them in custody at that time?
- A. Yes, sir. We didn't arrest them, just held them there for the Highway Patrol.
- Q. And after you arrested them, did you contact the Highway Patrol?
- A. Yes, sir.
- Q. Did the Highway Patrol come?
- A. Yes, sir, they were there in about—approximately ten minutes.
- Q. And did you turn these men over to the Highway Patrol?
- A. Yes, sir.
- Q. And did you check that car that they were traveling in?
- A. Yes, sir.
- Q. Describe to us what you saw and heard in that car?
- A. Well, I checked the front and it had a shotgun in it. And I checked the dash and under the seat for shells and [fol. 70] didn't find any.
- Q. Would that be the extent of your checking the car?
- A. Yes, sir, just casual. I didn't search the car too much.
- Q. And you said in roughly ten minutes you turned them over to the Highway Patrol.
- A. Yes, sir. Came down from Station 31.
- Q. And did you know these men before then?
- A. No, sir.

Q. Did you ascertain what their names were at that time?

A. I got Mr. Loyd out of the car and checked his driver's license, and I checked the car, and asked Mr. Douglas to get out while we were looking under the front seat, and he got back in the car and sat down.

Q. Now, the man that you saw there identified to you as being Mr. Douglas, do you see him in this court room?

A. Yes, sir.

Q. Where is he?

A. (The witness points to the defendant) There he is.

Q. Approximately what time was this?

A. It was around eight o'clock. Might have been a minute before or a few minutes after.

Mr. McLeod: That's all.

Cross examination.

By Mr. Esco:

Q. Mr. Teague, when you said "we" stopped them, you and who else?

A. I was by myself.

Q. Oh, you were by yourself.

A. Yes, sir.

Q. And how did you stop them?

A. Turned the red light on them and pulled them over.

Q. Now, you said you had Mr. Douglas get out while you were looking under the front seat.

A. Yes, sir.

Q. You bent down and looked under it?

A. Yes, sir.

Q. And that was a casual observation?

A. Yes, sir.

Q. Casual inspection. You bent down and looked under the front seat, and you checked the back?

A. Yes, sir.

Q. You inspected the trunk?

A. The trunk was—I call it the back.

Q. Did you have a gun in your hand or on you?

A. No, sir.

Q. What did you find in the trunk of that car?

A. There was a pump shotgun in there.

Q. A pump shotgun.

A. Yes, sir.

Q. Did you find an automatic shotgun?

A. No, sir.

Q. Now, while you were leaning down and looking under that front seat, what were these two tough teamsters doing?

A. Mr. Loyd was watching the police car and Mr. Douglas was standing off kind of to the side there.

Q. And you were all by yourself?

A. Yes, sir.

Q. Nobody there to help you?

A. No, sir.

[fol. 71] Q. And did they give you any resistance?

A. No, sir.

Q. Did they try to fight you?

A. No.

Q. From the time you saw them and turned the light on them, didn't they very peacefully stop and pull over, and followed every order that you gave them, and you leaned down and looked under the seat and inspected the car from the front, and these men just stood there and did nothing. Is that right?

A. Yes, sir.

Q. Now, you didn't call the Highway Patrol?

A. The Highway Patrol was already on the way before I pulled them over.

Q. You had called them before you pulled them over?

A. Yes, sir.

Q. And you had been alerted by the Highway Patrol that this—by the ones who had stopped them previously that morning?

A. My information came through the Highway Patrol station.

Q. You don't know whether the officers who had stopped them that morning were the ones that called you or not?

A. No, sir, they were not the ones who called me. The station called me.

Q. You don't know whether they called in to the station for some reason or not?

A. No, sir, I don't know nothing.

Q. What happened after the Highway Patrol got there?

A. Stood there and talked.

Q. How long did you stand around there?

A. I wouldn't have any idea.

Q. You didn't make any arrest?

A. I was just holding them for those.

Q. You were holding them. How do you hold a man without arresting him?

A. Well, I did it.

Q. What is the difference between holding a man and arresting him?

A. Well, I figure when you put a man under arrest you tell him he is under arrest, and I never did tell either man that they was under arrest.

Q. And they were free to leave at any time?

A. They didn't make no effort to. I don't know if they wanted to.

Q. Well, would you have let them leave, if they had wanted to?

A. I don't know. They didn't try.

Q. Did you tell them they were free to leave?

A. No, I didn't tell them.

Q. These men were cooperative with you, weren't they?

A. Yes, sir.

Q. Cooperated in every way.

A. Yes, sir.

Q. Did you scare them or anything?

A. No, sir.

Q. Did they make any protest or anything about your searching the car or anything of that sort?

A. No, sir.

Q. They just appeared that they didn't have any fear of anything at all, didn't they?

A. No, sir.

Q. Now, what happened next after you all stood around there?

A. Corporal Grayhouse, he got there in possibly ten min-

utes, more or less, and Officer Sisk, he came up, and we sat around and waited for orders from Montgomery.

[fol. 72] Q. And after you got those orders, what did you do then?

A. I parked the city police car on the highway and drove Mr. Loyd's car to Anniston to the Highway Patrol station.

Q. You drove Loyd's car to Anniston.

A. Yes, sir.

Q. How far was that?

A. Approximately twenty-one or twenty-two miles to the station.

Q. And when you got to Anniston where did you go?

A. Went into the Highway Patrol station.

Q. The Highway Patrol station. Now, what did you do with his car at that time—Mr. Loyd's car?

A. Parked it just behind the station.

Q. Back behind the station. Did you put any guard over it?

A. No, sir.

Q. Anybody watching it?

A. Well, there were several patrolmen around there.

Q. Well, you didn't put any guard over this car, or get any receipt for it or the contents, or any of those things?

A. No, sir. I turned it over to the Highway Patrol.

Q. Then what did you do?

A. They carried me back to the police car.

Mr. Esco: I believe that's all.

Mr. McLeod: Come down, Mr. Teague.

The Court: Well, gentlemen, we will take a recess for noon now and be back here at 1:30 if you can get served. Now the admonitions that the Court gave you last night are applicable to you in any recess. The case has not been submitted to you, and you will not discuss this case among yourselves, and you will certainly permit no one on the outside to discuss this case with you directly or indirectly. We stand in recess until 1:30.

(Court stands in recess for lunch, and after lunch court is called to order and the trial resumed.)

Mr. Esco: At this time we would like to state that the defendant is certainly willing to admit that Mr. Warren

was shot and seriously hurt, and we feel that it is unnecessary to waste the Court's time and put Dr. Smith on to go into the extent of the injuries. Going into it and describing the injuries would do nothing but prejudice the jury.

Mr. McLeod: The State of Alabama is not interested in any stipulation as far as Dr. Smith's testimony is concerned. Dr. Smith is available and we wish him to testify for the benefit of this jury.

Mr. Esco: I'd like to put that in the form of a motion—the statement that I have just made to the Court. Motion that we will stipulate—

The Court: The solicitor declined your offer, and there is nothing the Court can do about it. I can't run your business and I can't run the solicitor's business.

Mr. Esco: Well, at this time, in view of the previous statement, we make this motion to the Court: that Dr. Smith not testify as to the details of the injuries on the [fol. 73] grounds that it will simply serve to prejudice the jury. This is not a personal injury case or a negligence case in which the extent of the injuries is important.

The Court: I overrule the motion.

Mr. Esco: We except, if you please.

DR. WILLIAM C. SMITH, being duly sworn, testified as follows:

Direct examination.

By Mr. McLeod:

Q. What is your name?

A. William C. Smith.

Q. What is your occupation?

A. Physician and surgeon.

Q. And what is your training to qualify you to be a physician and surgeon, Doctor?

A. I received a degree of doctor of medicine in 1954 from Johns-Hopkins University School of Medicine, served four years internship at the Henry Ford Hospital in Detroit, and subsequently four years in training in general surgery

at the University Hospital and Veterans Hospital in Atlanta, Georgia.

Q. How long have you practiced in Selma, Doctor?

A. Since July, 1961.

Q. Are you licensed by the Medical Association of the State of Alabama?

A. Yes.

Q. Were you in the practice of medicine on the 18th day of January, 1962?

A. Yes, sir.

Q. Sometime during the day of January 18, 1962, did you have one Charles Layman Warren as a patient?

A. Yes.

Q. Where did you first see him, Doctor?

A. In the emergency room at the New Vaughan Memorial Hospital.

Q. Did you treat him, Doctor?

A. Yes.

Q. Did he have injuries?

A. Yes, he had injuries.

Q. Will you describe those injuries, Doctor?

A. He had injuries to his chest on the left side which apparently was caused by a gun shot of some sort.

Mr. Esco: Now, if your Honor please, he can answer the question, but a further description of the injuries is not responsive.

The Court: Overrule.

Mr. Esco: We except, if you please.

Q. Proceed.

A. Injuries caused a partial collapse of his lung on that side and also some bleeding inside of the chest. He had other minor injuries, nicks and cuts.

Q. Did you x-ray his body?

A. Yes, sir.

Q. Did the x-rays show further injuries?

A. Well, they showed the injuries to his lung on the left side and other organs inside his chest, and there was bleeding in his chest.

Q. And did the x-rays show any foreign matter in his chest?

[fol. 74] A. Yes, there were several metallic fragments. Two of these were about a quarter of an inch in diameter, and some very small minute particles.

Q. Did you perform any minor or major surgery on him?

A. Yes, sir, I put a small tube into his chest to remove the air and blood that had accumulated, and to remove any more that might be there subsequently.

Q. Now, you said something about one of his lungs partially collapsing. Tell us about that, Doctor.

A. Well, the left lung was collapsed approximately 10% to 15% of its normal size. This apparently was caused by escapement of air from his lung into his chest.

Q. Doctor, from your experience as a doctor and from your observation of these injuries that you have just described, were they the type of injuries that could have caused death?

A. Yes, I think they could have.

Q. Were they the type of injuries that cause grievous bodily harm?

A. Yes, they were serious injuries.

Q. How long did this man stay in the hospital, Doctor?

A. Twelve days.

Q. From the time that he entered your hospital, the first time you saw him at least, how long thereafter did you consider his condition as being critical?

A. For a little longer than a week—eight or nine days.

Mr. McLeod: Your witness.

Cross examination.

By Mr. Esoe:

Q. Doctor, was this the type of injury that would probably cause death?

A. I don't think I can say that it probably would.

Mr. Esoe: Thank you, Doctor, that's all.

Redirect examination.**By Mr. McLeod:**

Q. Were they injuries of such a nature that if he had not gotten medical attention, what would have been in all probability the result, Doctor?

A. I don't know that I can answer that question—his chances of survival without treatment.

Q. Without treatment, could it have caused death?

A. It could have, yes, sir.

Mr. McLeod: That's all.

(Dr. Smith leaves the court room, and then is recalled to the stand.)

Mr. McLeod: Dr. Smith, did we swear you in?**Mr. Smith:** No, sir, I don't believe so.

(Dr. Smith is administered the oath.)

Mr. Esco: We permit Dr. Smith to adopt his previous testimony.**Mr. McLeod:** Dr. Smith, do you adopt your testimony as [fol. 75] being the same that you would give if you had been under oath at that time?**Mr. Smith:** Yes, sir.**W. R. JONES,** being duly sworn, testified as follows:**Direct examination.****By Mr. McLeod:****Q.** What is your name?**A.** W. R. Jones.**Q.** Are you the chief investigator for the State of Alabama?**A.** Chief Investigator, yes, sir.**Q.** Where is your office located?**A.** Montgomery.**Q.** Were you in that capacity during the month of January, 1962?

A. Yes, I was.

Q. How many years of law enforcement work have you had, Major Jones?

A. Since December, 1945.

Q. Has that been with the State of Alabama—since that time?

A. Most of it.

Q. Since you've been a law enforcement man have you been to any special schools for training?

A. Yes, sir.

Q. What schools have you been to, Major Jones?

A. I've been to the FBI National Academy and the Southern Precinct School at the University of Louisville.

Q. And is the FBI Academy considered one of the best in the nation?

A. Yes, sir.

Q. And on January 18, 1962, did you have occasion to go to Anniston, Alabama?

A. Yes, I did.

Q. Did you see Jesse Elliott Douglas there?

A. Yes, I did.

Q. Where did you see him, Major Jones?

A. At the Highway Patrol office.

J. And did you take him into your custody at that time?

A. I questioned him.

Q. Later on in the day, what did you do with him?

A. I carried him to Birmingham.

Q. Who did you turn him over to?

A. To Sheriff Clark, and you.

Q. And when you turned them over to Sheriff Clark and me, were they arrested?

A. Yes, sir.

Q. Who arrested them?

A. Sheriff Clark.

Q. Did Sheriff Clark have a warrant?

A. Yes, sir.

Q. Did he display the warrant to the defendant?

A. He read it to him.

Q. And was there an automobile that the defendant had been riding in? Was that in Anniston when you got there?

A. Yes, sir.

Q. Was that automobile turned over to you?

A. Yes, sir.

Q. What did you do with it?

A. I drove it to Birmingham and had Captain Godwin drive it from Birmingham to Montgomery.

Q. And when you got to Montgomery what did you do with the car?

A. We locked it up at the Highway Patrol office that night, and the next day we carried it out to the Patrol shop.

[fol. 76] Q. And did you turn that car over to anyone?

A. Yes, sir, to Robert Finley.

Q. And who is Mr. Robert Finley?

A. He is with the State's Toxicology Department.

Q. Is he what is known as a criminalist?

A. Yes, sir.

Q. And when you saw this car in Anniston, Alabama, did you check it?

A. Yes, sir.

Q. Did you find anything in that car?

A. Yes, sir.

Q. What did you find?

A. I found a tag underneath the front floor pad on the driver's side, under the reinforcement of the floor mat just in front of the pedal. I found a shotgun in the back seat and in the trunk—found another shotgun underneath the back seat.

Q. I will show you here Plaintiff's Exhibit 18, marked for identification, and ask you do you recognize that tag?

A. Yes, sir.

Q. Is that the tag you just testified to that you found under the floor mat?

A. Yes, sir.

Q. And what did you do with that tag?

A. Turned it over to Mr. Finley.

Q. What else did you find in there, Mr. Jones?

A. Found a shotgun in the trunk of the car and one underneath the back seat.

Q. I will show you a shotgun here that is marked for identification as State's Exhibit No. 25, and ask you do you recognize that gun?

A. I think that's the gun that was in the trunk of the car.

Q. And what did you do with that gun?

A. Turned it over to Mr. Finley.

Mr. Esco: If your Honor please, we object and move to exclude any guns found or demonstrated to this jury which are not claimed to have done this crime.

The Court: Overrule.

Mr. Esco: We except.

Q. I will show you a gun here that is marked for identification as Plaintiff's Exhibit No. 27 and ask you do you recognize that gun?

A. Yes, sir, that is the gun underneath the back seat of the car.

Q. And when you saw this gun under the back seat of the car, what did you do with it?

A. Took them out and carried them into the Patrol office.

Q. Now, did you put it back into the car?

A. Yes, sir.

Q. Where did you put it in the car?

A. In the back seat.

Q. Did you put it under the back seat like you first saw it?

Q. No, sir, just laid it on the seat.

Q. Did you assist Mr. Finley in his investigation of this car?

A. Yes, sir.

Q. Did you find anything else in that car?

A. Yes, sir.

Q. What did you and Mr. Finley find?

A. Found a rifle in the outside of the grill, between the grill and the radiator lying down on the dust pan there.

Q. And I will show you a rifle here that is marked for [fol. 77] identification as Plaintiff's Exhibit 25, and ask you do you recognize that rifle?

A. Yes, sir.

Q. Where did you find that rifle?

A. That was wrapped up in a mechanic's fender cover out in the grill.

Q. I will show you a cloth here that is marked for identification as Plaintiff's Exhibit No. 22 and ask you do you recognize that? A. Yes, sir, that's what it was wrapped up in.

Q. This rifle was wrapped in this?

A. Yes, sir.

Q. And where were they in the car?

A. Between the grill and the radiator.

Q. What else did you find in that car, Major Jones?

A. That was all I found.

Q. Major Jones, what day of the week was this when you brought these men to Birmingham and turned them over to Sheriff Clark and myself?

A. It was on Thursday.

Q. When was it that you were making this check of this automobile in Montgomery, Alabama?

A. The following morning, Friday.

Q. Now, the next day, Saturday, did you have occasion to be in Selma, Alabama?

A. Yes, sir.

Q. Were you at the Dallas County jail?

A. Yes, sir.

Q. That night did you have a conversation with the defendant, Jesse Elliott Douglas?

A. No, sir.

Q. Did you see him?

A. Yes, sir, I saw him.

Q. Where was he when you saw him?

A. He was in the large room at the front of the jail. Looking from the outside it would really be the back, from the way you enter.

Q. And at the time you saw him back there was anyone else present?

A. Yes, sir.

Q. Who was present?

A. It was he and Sheriff Clark and you and Captain Godwin, Lt. Ralph Holmes, and Bob Frye the FBI agent.

Q. And in your presence did you hear a statement read to Mr. Douglas?

A. Yes, sir.

Mr. Esco: If your Honor please, we object to this line of questioning, as to any statement read, and make a motion that if he is attempting to prove any third party statement we would like to take this man on voir dire without the jury being here.

(The jury retires to the jury room.)

Mr. Esco: Will you state for the record it is your intention at this time to question him as to inquiries made to a reputed confession?

Mr. McLeod: That is right.

Mr. Esco: Let the record so read, if you please.

Mr. Esco: If your Honor please, at this time we offer to state, to lay the predicate for a purported confession by a third party accomplice, we would like to object to the introduction of any such statement, to the testimony or the reference to any such statement, on the grounds that any purported confession signed by a third party accomplice [fol. 78] is not legal evidence in the State of Alabama against the accomplice, it is hearsay, incompetent, illegal, immaterial, it was an extra judicial statement made outside of the hearing of this defendant, that whether he did or did not say anything, a statement was on advice of counsel, if he did not say anything that was specifically on advice of counsel and numerous advice of counsel, he had been informed on previous occasions by counsel not to make any statement or any comment. And we'd like a ruling by your Honor at this time as to whether or not your Honor anticipates allowing the purported statement in, on those grounds.

(The Court speaks to Mr. Esco in a low voice.)

Mr. Esco: Well, there is one complete defense, of course, to what the solicitor is attempting here, and that is simply for me to take the oath and state that I informed the defendant not to make any statement or any comment outside of my presence. I will lay a predicate for that, too.

Cross examination.

By Mr. Esco:

Q. Major Jones, was I present at the time that you are talking about?

A. No, sir.

SAM EARL ESCO, JR., being duly sworn, testified as follows:

Statement.

By Mr. Esco:

On Friday afternoon—. I am Sam Earl Esco, Jr., attorney at law, Selma, Alabama, forty years of age, 203 Hooper Drive, Selma, Alabama. On Friday afternoon about 2:30 o'clock, January 19, 1962, I was retained to represent Mr. Douglas and did visit him in the county jail in Selma, Alabama. At that time I advised the defendant in this case, Mr. Loyd, not to make any statement outside of my presence, that he was not obligated by law to make any statement without my being present, that he was not to make any comment on any papers or statements or any declarations whatsoever. Again on Saturday morning, January 20, 1962, about eleven o'clock a.m., I called on Mr. Douglas in the same jail and advised him at that time not to make any statement until I had made a proper investigation and advised him further. About 7:15 p.m. on Saturday evening, January 20, 1962, I visited the defendant, Mr. Douglas, in the same jail and was informed that he had been questioned on various matters by numerous police officers, that he had not made any statement, and I consequently advised him that I had not finished my investigation and not to make any statement outside of my presence. At 12:30 a.m. Sunday morning, January 21, I saw Mr. Douglas in the hallway of the county jail, there talked with him and was told that he had been questioned by numerous officers, that he had made no statements on my advice, and he was again advised [fol. 79] that I was not ready for him to make any statement and that my investigation was not complete. At that time he stated that he would not make any statement except in my presence. Since that date he has been free to make any statement that he saw fit.

Cross examination.

By Mr. McLeod:

Q. On Friday afternoon did you see Mr. Bob Frye, the FBI agent?

A. I did, sir.

Q. Did he ask you for permission to go and talk to your client?

A. He did, sir.

Q. And did you tell him to go ahead and talk to him "but I hope he wont tell you anything"?

A. Yes, sir.

Mr. McLeod: That's all, Mr. Esco.

Mr. Esco: In qualification of that statement, I told Mr. Frye at that time that it was my opinion that the defense and the prosecution should be able to start off even, and I had not interviewed my clients and I hoped they wouldn't tell him anything until such time as I had an even start with him on the investigation.

Q. But you didn't tell him he couldn't talk to him, did you?

A. No, sir.

Q. You told him to go to it, didn't you?

A. (No answer.)

Mr. McLeod: That's all.

Mr. Esco: I believe that is all.

The Court: Will you step back here a minute?

(The Judge, Mr. McLeod and Mr. Esco retire to the Judge's chambers, and after a few minutes return to the court room)

The Court: Court will come to order.

Mr. McLeod: The State calls Olen Loyd to the stand.

(The jury returns to the jury box.)

OLEN RAY LOYD, being duly sworn, testified as follows:

Direct examination.

By Mr. McLeod:

Mr. Esco: At this time I'd like to object to this witness appearing on the stand, and state to the record that I represent this witness, who is a defendant who yesterday evening was convicted of assault with intent to murder in

this Court, who has filed a formal appeal with this Court and the appeal bond has been filed and approved.

(The Court calls Mr. Esco to the bench)

Mr. Esco, continuing: Order allowing appeal and setting his bond was subsequently vacated by the Circuit Judge on the same date. That this witness has in open court by and through Sam Earl Esco, Jr., as his attorney, given [fol. 80] notice of appeal and said appeal is now pending.

The Court: Overrule.

Mr. Esco: We except, if you please.

Q. What is your name?

A. Olen Ray Loyd.

Q. Where do you live?

A. (No answer.)

Q. Where is your home?

A. I refuse to answer on the grounds that any answer I give will tend to incriminate me.

Mr. McLeod: Your Honor, I'll have to ask the Court to instruct him an answer the question.

The Court: Yes, sir. Mr. Loyd, the understanding of the Court is that the jury has already determined your guilt in the only case pending in this Court arising out of this alleged transaction, and that the benefits and prohibitions of the Fifth Amendment have no application to you and your testimony on this witness stand. You cannot enforce them successfully, and the Court instructs you that you are required and will be required to answer.

Q. Where do you live?

A. Gadsden, Alabama.

Q. On the 18th day of January, 1962, were you arrested in Ohatchie, Alabama?

A. I claim the privilege—I claim the privilege under the Fifth Amendment to my constitutional rights.

Mr. Esco: I object.

The Court: The Court overrules the objection. The Court instructs you that you are required to answer.

A. Not to my knowledge.

Q. On Saturday, January 20, 1962, were you in the Dallas County jail?

A. Not to the best of my knowledge.

Q. Do you remember talking to Mr. Robert Frye, the FBI agent, at that time?

A. Not to the best of my knowledge.

Mr. McLeod: I will ask the Court to force this man to answer the question.

Mr. Esco: If the Court please, we object to forcing this man to do anything. This is not a country of force, this is a country of law.

The Court: I can't force the witness to answer. All I can do is to tell him that he is in contempt of this Court. That's all I can tell him.

Mr. Esco: Your Honor, to shorten this and not make a mockery of justice, let me state plainly that I have instructed this witness to claim his constitutional privilege and not to answer any questions. And if your Honor would like to judge me in contempt of Court—let's not make a circus of this—

The Court: I will call you back here.

(The Judge, Mr. Esco and Mr. McLeod leave the court room.)

(The witness leaves the court room with Mr. Esco)

[fol. 81] (The witness returns to the witness stand.)

Mr. Esco: At this time I move that this witness be excluded from the witness stand on the grounds that we have given notice of appeal in this case, that we are preparing a motion for a new trial, that he is privileged from constitutional law of the United States from testifying at this time and that he is claiming the right.

The Court: The motion made is overruled and denied.

Mr. Esco: We except, if you please.

Mr. McLeod: I would like to ask the Court to declare this witness—I called this man as my witness. He has proven to be a hostile witness. I would like to ask the Court to declare him a hostile witness and give me the privilege of cross-examination.

The Court: Yes, sir.

Mr. Esco: If your Honor please, I ask at this time if you are going to hold the man in contempt?

Q. Is that your signature (showing witness signature on confession)?

A. I'm not sure.

Q. I will ask you if on January 20, 1962—

Mr. Esco: (Interrupting) If your Honor please, I object to the reading of any document or purported confession,—

Mr. McLeod: (Interrupting) This is cross-examination.

The Court: Hostile witness. Overrule.

Mr. Esco: We except, if you please.

Q. I will ask you if on the night of January 20, 1962, in Selma, Alabama, in the Dallas County jail if you didn't make the following statement: (reading) "I, Olen Ray Loyd, make the—"

Mr. Esco: (Interrupting) I object to this being read in the presence of the jury.

Mr. McLeod: You've already got an objection in there.

Mr. Esco: I object to this being read in the presence of the jury.

The Court: Overrule.

Mr. Esco: We except.

Q. "I, Olen Ray Loyd, make the following statement of my own free will, voluntarily and without any threats or hope of reward to Ralph Holmes, whom I know to be a state investigator, Sheriff James G. Clark of Dallas County, Alabama." Did you make that statement and sign it?

A. I refuse to answer on the immunity of the laws of the State of Alabama and my constitutional rights.

Q. I further ask you, didn't you say, "I have been informed that I do not have to make any statement unless I desire to do so, that any statement I do make can be [fol. 82] used against me in a court of law, and that I have the right to have the advice of an attorney before making any statement", did you make that statement?

A. I refuse to answer on the immunity of the laws of the State of Alabama and my constitutional rights.

Q. Did you further say, "I am thirty-nine years of age and was born September 9, 1922, at Kenner, Alabama. I live at 742 Brookside Drive, Gadsden, Alabama. I was employed as a truck driver for Bowman Transportation Company in Gadsden, Alabama, until we went on strike on November 4, 1961." Did you make that statement?

A. I refuse to answer on the immunity of the laws of the State of Alabama and my constitutional rights.

Q. Did you further say, "On January 17, 1962, I went to the union hall in East Gadsden and signed in to walk the picket line at Bowman Transportation Company. I walked until I was relieved by another boy at 4:45 that evening, who told me the police were at the union hall and wanted to talk to me. He took my place in the line and I went to the hall. When I arrived at the back door of the hall Mr. Fred Renegar met me and he said that he had a call from Birmingham for me to make a 'trip'. He was, I think, referring to a trip where I would drive a truck as he said I would probably be glad to get a trip. He asked me if I would be willing to make a trip with Jesse Douglas and that we should report to the union hall in Birmingham, Alabama, at 6:30 p. m. He asked me if I had to go home to tell my wife and I said that I would." Did you make that statement?

A. I refuse to answer on the immunity of the laws of Alabama and my constitutional rights.

Q. Did you make the further statement, "I left the hall and went to Cargo Standard Service Station in Gadsden and purchased six gallons of gas for my car on credit. I told Mr. Cargo that I had to go to Birmingham to make a trip and I would pay him when I returned. I left the station and went to my father-in-law's home in Campbell Court. His name is W. B. Morgan and I told him I had to make a trip and that I needed some money to eat on and I borrowed \$10.00 from him." Did you make that statement?

A. I refuse to answer on the immunity of the laws of Alabama and my constitutional rights.

The Court: I have heretofore stated, since this witness has been on the stand, that the protection of the Fifth Amendment is not available to this defendant and that under the instructions of the Court that he is required to answer, relevant to these pertinent questions, as may be passed upon by the Court.

Q. Did you make the further statement, "I left there and went to the union hall and picked up Jesse Douglas. We left the hall and went to my home and I told my wife that I was going to Birmingham to make a trip. I told her that I didn't know who for or where we were going to make the trip. When we left Gadsden I had two shotguns, the rifle that we got at Bob Arrington's house on the night of 1-15-62, some shotgun shells that were in a army bandolier. We had no ammunition for the rifle in the car. The shotgun shells were all 12 gauge and were double 'O' buck and 'pumpinkballs'. The shotguns were a J. C. Higgins pump and an automatic shotgun that belongs to a B. F. Jackson in Gadsden and I do not know the make of this gun." Did you make that statement?

[fol. 83] A. I refuse to answer on the immunity of the laws of Alabama and my constitutional rights.

Q. Did you make the further statement that, "Jesse Douglas and I went to Birmingham, Alabama, arriving there about 6:30 p. m. and checked in at the union hall to Sam Webb. Webb asked us if we knew why we were down there and I told him I thought to make a trip and he asked if Renegar had told us exactly why and I said that I thought I was to drive a truck somewhere. He said there was a little more to it than that and that there was two Bowman trailers at the West Brothers terminal in Birmingham that was going to run that night and we were to follow these trailers and scare them so they wouldn't be driving any more. Webb asked me if I had anything to scare them with and I told him about the shotguns and rifle in my car and he said not to use the rifle because that might kill a driver, that he thought the shotgun would be best. We left the union hall in Webb's car and he drove us by the West Brothers terminal to see if the trailers had left there. They were still there so we returned to the union hall. That was about seven p. m. in the evening. He asked

if I had any other tags other than the tag that was registered to my car and I told him that I did not. He told me to take the front tag off of his car and use it on my car." Did you make that statement?

A. I refuse to answer on the immunity of the laws of Alabama and my constitutional rights.

Q. Did you further make the statement, "I asked him what I would do with the tag if we made any contact with any trucks and he said hold it and he would pick it up later. He did not offer to pay us any money at that time but he asked if we had any money to eat on. I told him I had borrowed \$10.00 before I left Gadsden, Alabama, and that my car was low on gas. He took us by a service station, a Texaco station near the union hall and filled the car with gas which he paid for on his credit card. After we gassed up we went to the union hall and picked up Webb's tags from his car. He let us out of the rear door of the hall to go around to the side of the hall where his car was parked and Jesse and I took the front tags off his car." Did you make that statement?

A. I refuse to answer under the laws of the State of Alabama and my constitutional rights.

Q. Did you make the further statement, "We left the hall and drove toward Gadsden so that if anyone saw us they would think we were going back to Gadsden. We went out Tenth Avenue, crossed over one block to Georgia Road, and followed this road to First Avenue. We turned south on First Avenue and went all the way through Birmingham to the Birmingham-Bessemer Highway. We stopped at Mary's Drive-In for sandwiches and coffee and spent about an hour or an hour and a half there." Did you make that statement?

A. I refuse to answer under the laws of Alabama and my constitutional rights.

Q. Did you make the further statement, "We waited there at the Drive-In because Webb had told us these Bowmen trailers would be coming out the Birmingham-Bessemer Highway. We left Mary's Drive-In around nine p. m. or nine-thirty p. m. as we got tired sitting there and went south to Bessemer. We turned around near Bessemer and came back to a big bowling alley on this highway. Be-

tween the time we left Mary's Drive-In and about eleven p. m. we headed toward Birmingham and met the two Bowman trailers coming out being pulled by West Brothers [fol. 84] tractors." Did you make that statement?

A. I refuse to answer under the immunity of the laws of Alabama and my constitutional rights.

Q. Did you make the further statement, "We turned off a side street and changed the tags on my car. We took both of my tags off, front and back, and put Webb's tag on the back of my car. We went back to the Birmingham Bessemer Highway and headed south behind these trucks. We came up on the rear of these trucks on the hill which is near the Alabama Highway Patrol station in Midfield. We passed these trucks on this hill and went on ahead of the trucks through Bessemer. After getting through Bessemer we then speeded up to about sixty or seventy miles an hour and traveled down Highway 11 to the junction of 5 and 11. We turned down No. 5 toward Centreville, Alabama. We went to the city limits of Centreville and then turned around and went back north on No. 5. When we left Birmingham, Alabama, Douglas was driving and he was still driving at the time we turned around at the city limits of Centreville. I was going to handle the shooting and had gotten into the back seat of my car." Did you make that statement?

A. I refuse to answer under the laws of Alabama and my constitutional rights.

Q. Did you make the further statement, "We intended to shoot these trucks before they got to Centreville, but when we turned and went back north and passed the trucks again I was unable to bring myself to the point of shooting the trucks. After we passed the trucks this time we turned around and went south again toward Centreville, Alabama. These trucks were both stopped at a truck stop in Centreville where we passed them again and we proceeded on south on No. 5 about twenty miles. We sat alongside of the highway waiting for the trucks to come on and several trucks passed us, so we thought we ought to move before someone recognized us. We went back north again and saw a station wagon that looked suspicious so we turned off No. 5 onto 16. We drove over this route about six or

eight miles and pulled in behind a church. We sat there for about five minutes and then heard what sounded like two trucks together going south on No. 5. We thought this was the two trucks and we went back to No. 5. When we got to No. 5 I told Douglas that I would drive and he said that was fine because I knew the car better than he. I drove on until we caught these trucks about five or eight miles above the junction of No. 5 and No. 80 and we passed them proceeding on to the junction where we turned around and headed back north to meet these trucks. Jesse Douglas was in the back seat with the automatic shotgun that belongs to B. F. Jackson and had it loaded with buckshot. He rolled down the window and when we passed these trucks he shot the lead truck as we passed them heading back north as they were coming south. We then went on to Highway 14, turned left and went into Greensboro, Alabama. We turned left in Greensboro on No. 69, drove south about five miles and realized we were going the wrong direction to go to Tuscaloosa, Alabama. We turned around and went back up to No. 69 to Tuscaloosa." Did you make that statement?

A. I refuse to answer under the laws of Alabama and my constitutional rights.

Q. "I judge that the truck was shot between two a. m. [fol. 85] and two-thirty a. m. and between that time and when we got to Greensboro we stopped one time and switched the tags back on the car. After we got north of Tuscaloosa about twelve miles we stopped at Frederick's Truck Stop and gassed up. This was about four-thirty a.m. I bought \$5.00 worth of gas. This truck stop is on Highway No. 11 out of Tuscaloosa. And about thirty minutes after we left there we were stopped at the intersection of Highway No. 11 and No. 5 by two Alabama Highway Patrolmen. When I turned to the right on No. 5 we were stopped and checked. They told us at that time there had been a truck driver shot in Dallas County and they were making a survey of all cars. They found my pump shotgun and a part of a box of shells in the trunk of the car, but we had put the automatic and the rifle under the hood of the car between the grille and the radiator. I told them

I had been hunting and had not taken my gun out of the car." Did you make that statement?

A. I refuse to answer under the laws of Alabama and my constitutional rights.

Q. Did you make the further statement, "We told them we were on our way to Anniston, Alabama, to hunt for work. They asked where we had come from and I said from Tuscaloosa, Alabama, but we did not live there, that we had been hunting for work and that we lived in Gadsden, Alabama. This check was made about five in the morning, and after this we headed toward Gadsden, Alabama. We went south on No. 5 toward No. 24 at West Blockton, Alabama, took No. 24 out of there and ran onto a dirt road where we were lost for sometime. We finally hit a little country road No. 10 into Montevallo, Alabama, took No. 25 out of Montevallo and followed this to near Childersburg where we made a stop on a dirt road and there we put the automatic shotgun in the back seat and the shells in the well over the back fender. We had previously, when we changed the tags, put the tags belonging to Webb under the rubber floor mat on the driver's side. We continued on this dirt road until it came back out on No. 25 and followed this route on up through Leeds, Alabama. We took 78 out of Leeds to the junction of No. 78 and No. 77. We turned left on No. 77, headed north, and were stopped near Ohatchee, Alabama, by the police. After the police stopped us we waited there until an Alabama Highway Patrol car came up and the police drove my car with Douglas in it with him, and I rode with the Alabama Highway Patrolman to the Alabama Highway Patrol station in Anniston, Alabama." Did you make that statement?

A. I refuse to answer under the laws of Alabama and my constitutional rights.

Q. And then were you asked this question and gave this answer to it, "Who loaded the automatic shotgun?" "I don't recall which one loaded it the last time." Were you asked that question and was that your answer?

A. I refuse to answer under the laws of Alabama and my constitutional rights.

Q. Were you asked the question, "How many shots were fired at the truck?" And your answer, "Only one." Did you say that?

A. I refuse to answer under the laws of Alabama and my constitutional rights.

Q. Were you asked this question, "Was the empty ejected inside the car?" And your answer, "When it was fired, to the best of my knowledge it was." Is that true?

A. I refuse to answer under the laws of Alabama and my constitutional rights.

[fol. 86] Q. Were you asked the question, "What happened to the empty shell?" And your answer, "To the best of my knowledge it was found by Douglas and thrown out the car some three to five miles north of the shooting." Is that true?

A. I refuse to answer under the laws of Alabama and my constitutional rights.

Q. Were you asked the following question, "Did Douglas say if he found the shell?" And then the answer was, "Yes, and he said he threw it out the window." Is that true?

A. I refuse to answer under the laws of Alabama and my constitutional rights.

Q. And then in your own handwriting did you say, "I, Olen Ray Loyd, have had above read to me, consisting of ten pages which I have initialed, and they are true and correct to the best of my knowledge." And signed your name, "Olen Ray Loyd". Is that true?

A. I refuse to answer under the laws of Alabama and my constitutional rights.

Q. Then down below your name it was signed, "Witnessed by Ralph Holmes, investigator for the Department of Public Safety of the State of Alabama", and under his name, "James G. Clark, Sheriff, Dallas County, Alabama", and under his name, "R. W. Godwin". Was that done in your presence?

A. I refuse to answer under the laws of Alabama and my constitutional rights.

Mr. McLeod: Judge, I'd like to ask the Court to require this man to answer my questions.

The Court: We will take about a ten minutes recess and you gentlemen may retire to the jury room.

(Jury retires to the jury room, and court stands in recess for a few minutes.)

(Court called to order and Olen Ray Loyd returns to the witness stand with the jury still out of the court room.)

The Court: Court will come to order.

Mr. Esco: I'd first like to object to the reading of this purported confession on the grounds that it is hearsay evidence, that it was made outside the hearing of this defendant, it was not subject to cross-examination, and we move to exclude it from the evidence.

The Court: The Court will deny your motion.

Mr. Esco: We except, if you please. And at this time, your Honor, we make a motion for a mistrial on the grounds that this jury has been so prejudiced from these proceedings, and from the attempts of the prosecution to use illegal evidence, that no fair and just verdict whatsoever could come from a jury that has been so prejudiced.

The Court: Motion is denied.

Mr. Esco: We except, if you please.

CONTEMPT CITATION RE WITNESS OLEN RAY LOYD

The Court: Mr. McLeod, as to the witness presently on the stand, the Court instructs you to file in the Circuit Court of Dallas County in Equity an information charging him with contempt of Court, with a particular failure and refusal of the defendant to comply with the instructions and orders of this Court. The Court will set that matter down for hearing at its earliest convenience.

[fol. 87] Mr. Esco: Your Honor, please, I move at this time that the witness be allowed to expunge himself of contempt—of possible contempt—and make answer as best he may of the questions asked him by the solicitor. Must he remain in jail under this civil case?

The Court: Just so long as he remain obdurate.

The Court: All right now. Are you ready for a jury?

Mr. McLeod: Yes, sir.

The Court: Have the jury brought in.

(Jury returns to the jury box.)

Q. Mr. Loyd, I will ask you again, is that your signature (holding confession before witness)?

A. Mr. McLeod, I'm not sure. I don't know. I'm not positive.

Q. Did you make a statement to Mr. Bob Frey, FBI agent, and Mr. Ralph Holmes, Mr. James G. Clark, Jr., at the Dallas County jail on January 20, 1962?

A. Mr. McLeod, I'm not sure. I was under a lot of pressure then, and I don't know for sure.

The Court: The Court will stand in recess for five minutes. Gentlemen, you may go back out. I will give you five minutes if you wish to confer with your client.

(The jury retires to the jury room.)

The Court: The Court does not intend to be made a mockery or a circus as you intimated a few minutes ago. He can either answer or he can not answer. We will stand in recess for five minutes.

(Olen Ray Loyd returns to the witness stand.)

The Court: Mr. Loyd, are you willing to purge yourself of contempt of the Court and testifying or not?

The Witness: Yes, sir.

The Court: You are. All right. Call the jury.

(The jury returns to the jury box, and Mr. Loyd continues on the witness stand.)

Q. Mr. Loyd, I show you a paper here, consisting of ten handwritten pages, and I will ask you, is that your signature?

A. Er—I made a statement to—er—

Q. (Interrupting) I'm asking you, is that your signature (holding confession before witness)?

A. I'm not sure, Mr. McLeod, whether it is or not.

The Court: All right. The jury is excused.

(The jury retires to the jury room.)

The Court: Come around, Mr. Loyd.

(The witness leaves the witness stand and comes before the Judge.)

The Court: Mr. Esco, will you step up here?

(Mr. Esco stands beside Mr. Lloyd in front of the Judge.)

[fol. 88] The Court: There has been considerable effort here to get the Court to set an appeal bond for you, and I understand the papers are in process to mandamus this Court to grant you an appeal. I don't think until you are sentenced you have the privilege of appealing, and this Court at this time is going to accommodate you. Now, yesterday or last evening you heard the verdict of the jury, which reads as follows: "We, the jury, find the defendant guilty of assault with intent to murder, as charged in the indictment. Calvin E. Harrell, Jr." returned into Court, did you?

The Witness: Yes, sir.

The Court: Do you have anything to say why the judgment of the Court should not be pronounced against you at this time?

The Witness: No, sir.

JUDGMENT RE OLEN RAY LOYD

The Court: All right. According to the verdict of the jury finding you guilty of assault with intent to murder, as charged in the indictment, you are accordingly adjudged to be guilty of assault with intent to murder as charged in the indictment, and as punishment for said offense you are sentenced to the penitentiary of Alabama for a period of twenty years. Mr. Clark, will you take the prisoner?

The Court: Is there notice of appeal?

Mr. Esco: Yes, sir.

The Court: The Court will set your appeal bond at \$50,000.00.

(The sheriff removes the prisoner from the court room.)

The Court: Call the jury in, please.

(The jury returns to the jury box.)

MOTION FOR A NEW TRIAL AND DENIAL THEREOF

Mr. Esco: We would like to make a motion for a new trial on the grounds that the proceedings have been very irregular here today and we feel it has been prejudicial to this defendant.

The Court: Let the record show, Mrs. Bailey, that the jury has not been in the court room or present during the preceding hearing. Your objection is overruled.

Mr. Esco: It is a motion, your Honor.

The Court: Your motion is overruled.

Mr. Esco: We except, if you please.

W. R. JONES, recalled to the stand, testified further as follows:

Direct examination.

By Mr. McLeod:

Q. Major Jones, I show you a paper here that is marked for identification purposes as Plaintiff's Exhibit No. 1, and ask you do you recognize that?

A. Yes, I do.

[fol. 89] Q. And on the night of January 20, 1962, were you present in the Dallas County jail?

A. Yes, I was.

Q. I will ask you if you are the same Major Jones who was on the stand previously?

A. Yes, sir.

Q. And who was present when Olen Loyd signed that?

A. Lt. Ralph Holmes, and Mr. Bob Godwin, and Sheriff Clark, and FBI Agent Frye, and yourself—Bob Frye of the FBI.

Q. Did you see him sign it?

A. Yes. And Mr. Finley was present too.

Mr. McLeod: Your witness.

Mr. Esco: Did you introduce that instrument?

Mr. McLeod: No, I didn't introduce it. I just had it marked for identification purposes.

Mr. Esco: Let the record show, if you will, that the solicitor questioned as to State's Exhibit No. 1, and we move to exclude on the grounds that the document is based purely on hearsay.

The Court: Motion is denied.

Mr. Esco: We except, if you please.

Lt. RALPH H. HOLMES, being duly sworn, testified as follows:

Direct examination.

By Mr. McLeod:

Q. Lt. Holmes, what is your name?

A. Ralph H. Holmes.

Q. What is your occupation?

A. Criminal Investigator for the Department of Public Safety of the State of Alabama.

Q. Were you in that capacity during the month of January, 1962?

A. I was.

Q. On or about the night of January 20, 1962, were you in the Dallas County jail in Selma, Alabama?

A. Yes, sir.

Q. And who was present with you when you went in that Dallas County jail, Lt. Holmes?

A. Frye and myself.

Q. I'm talking about approximately ten or eleven o'clock at night?

A. Myself, Mr. Frye, you, Sheriff Clark, Major Jones and Captain Godwin.

Q. Was Mr. Finley, the State criminalist, present?

A. Yes, sir, Mr. Finley.

Q. I will show you a paper here that is marked for identification purposes as Plaintiff's Exhibit No. 1, and ask you do you recognize that?

A. I do.

Q. And whose name is signed to it?

A. The name of Olen Ray Loyd.

Q. And witnessed by whom?

A. Myself and Sheriff Clark and R. W. Godwin.

Q. Were you present when Olen Ray Loyd prepared this?

A. Yes, sir.

Q. With the exception of the last paragraph, in whose handwriting is that?

A. Mine.

Q. Whose handwriting is the last paragraph?

A. Olen Ray Loyd.

Mr. McLeod: That's all, Lt. Holmes.

[fol. 90] Mr. Esco: I'd like to object and move to exclude this testimony as to Plaintiff's Exhibit No. 1, which this witness testified.

The Court: Motion is denied.

Mr. Esco: We except.

Cross examination.

By Mr. Esco:

Q. Mr. Holmes, the persons you named, were they all of the persons present at that time?

A. I'm almost sure they were. They were all that were present at that particular time.

Q. Was the person who signed that statement's attorney present?

A. No, sir.

Mr. Esco: Thank you, sir.

Mr. McLeod: Come down, Lt. Holmes.

ROBERT L. FRYE, being duly sworn, testified as follows:

Direct examination.

By Mr. McLeod:

Q. What is your name?

A. Robert L. Frye.

Q. What is your occupation?

A. Special Agent for the Federal Bureau of Investigation.

Q. Where are you stationed, Mr. Frye?

A. In Selma.

Q. Were you stationed in Selma during the month of January, 1962?

A. I was.

Q. And on the night of January 20, 1962, did you have occasion to be at the Dallas County jail?

A. I was.

Q. Approximately somewhere between ten and eleven o'clock on the night of January 20, 1962—I withdraw that. First, I will show you a statement that is marked for identification purposes as Plaintiff's Exhibit No. 1, and ask you do you recognize that?

A. I do.

Q. Whose name is signed to it, Mr. Frye?

A. Olen Ray Loyd.

Q. Did you see Olen Ray Loyd sign this paper?

A. I did.

Q. You recall who else was there at the time he signed this paper and who witnessed this paper being signed?

A. Lt. Holmes—Ralph Holmes, he is an Alabama Highway Patrol investigator; Chief William Jones; Sheriff Clark; and Assistant Chief Godwin was there; and Bob Finley, State criminalist. That's all I recall.

Q. Was I there?

A. You were there at that time.

Mr. McLeod: Your witness.

[fol. 91] Cross examination.

By Mr. Esco:

Q. Mr. Frye, was this the only document signed that night in your presence?

A. No, sir.

Q. Was there another document signed?

A. I took a statement.

Q. Do you have that statement available?

A. I don't.

Q. Could you release that statement for comparison use?

A. No, I don't have it in my possession.

Q. How long would it take you to get it, Mr. Frye?

A. At least a day. It is in Mobile.

Mr. Esco: I believe that's all.

Mr. McLeod: Come down, Mr. Frye.

L. C. CROCKER, being duly sworn, testified as follows:

Direct examination.

By Mr. McLeod:

Q. What is your name?

A. L. C. Crocker.

Q. What is your occupation?

A. Deputy Sheriff.

Q. And were you in that capacity during the month of January, 1962?

A. Yes, sir.

Q. On January 21, 1962, did you have occasion to go out on Highway 5 in Dallas County?

A. Yes, sir.

Q. Did you check the road out there?

A. Yes, sir.

Q. I will show you the hull here that is marked for identification as State's Exhibit No. 2, and ask you do you recognize that?

A. Yes, sir.

Q. How do you recognize that?

A. It has my initials on it.

Q. Where did you find this, Mr. Crocker?

A. From the scene of this shooting out there it was approximately 9.5 miles north on Highway 5.

Q. On what side of the road was it?

A. Well, it was on the right side going north, or the east side.

Q. Approximately how far from the edge of the pavement was that hull located?

A. Ten foot and four inches I believe is correct.

Q. And did you check the right of way from where the scene happened this nine and a half miles all the way until you found this?

A. Every inch of it.

Q. Did you allow anyone to pick this up from where it was?

A. No, sir.

Q. Did you turn it over to somebody?

A. Yes, sir.

Q. Who did you turn it over to?

A. Mr. Finley. And in his company was Chief Jones and Captain Godwin or Goodman and the sheriff and yourself, and several others.

Q. Were those you named all present when you found it?

A. No, sir.

Q. Were we in the vicinity?

A. Yes, sir.

Q. And did you allow anyone to touch it before Mr. Finley got to it?

A. No, sir.

[fol. 92] Q. What position was it laying in when you saw it?

A. Standing south of the shell, facing the north with the shell on the right, the shell would be—let's see—the shell would be in that position there (holding shell in a slanting upright position), to the best of my knowledge.

Q. Tell us about the terrain there. What was it, grass or what?

A. Yes, sir, it was short grass—very short grass being the winter time—I'd say probably a inch thick.

Q. And was it in the grass?

A. Well, yes, sir, the end of it, the brass end was sitting in the grass. Yes, sir.

Q. And the grass was holding it in that angle?

A. Yes, sir.

Q. And you say you initialed it after Mr. Finley got there?

A. Yes, sir. I didn't touch it until after he was through with it.

Q. In fact you took some pictures of it first, didn't you?

A. Yes, sir.

Q. Before it was moved. A. Yes, sir. After we took the pictures, then we initialed it.

Mr. McLeod: That's all.

Cross examination.

By Mr. Esco:

Q. Mr. Crocker, what time on Sunday afternoon did you go out searching this nine and a half miles for this shotgun shell?

A. Repeat that, sir.

Q. What time in the afternoon did you leave the jail going out to search this nine and a half miles for this shell?

A. Well, sir, we didn't leave in the afternoon, sir. We were already there when afternoon came.

Q. What time did you leave?

A. We left the jail about daylight, which would be about I'm not sure, about five-thirty or six o'clock.

Q. Did you carry some city prisoners with you?

A. No, sir, we didn't.

Q. Did you use some city prisoners in the search—I mean any county prisoners?

A. Yes, sir.

Q. Did you use them in the search?

A. Yes, sir.

Q. How many did you use?

A. We left the jail with four, sir.

Q. And how many of you searched each side of the road?

A. We had three to each side. That is, the other deputy and myself, we each had one side and two prisoners on each side.

Q. You started at the stake that marked the place of the shooting?

A. Yes, sir.

Q. And what time was the shell found?

A. At eight minutes to four that afternoon.

Q. You all had searched the roadside all day until you finally found the shell?

A. Yes, sir. From that morning, sir, until eight minutes to four.

Q. Isn't it a fact, Mr. Crocker, that a city prisoner, Bill Broadhead, actually found this shell?

A. No, sir.

[fol 93] Q. Picked it up and handed it to you and said to you, "This is it"!

A. No.

Q. How far was Bill Broadhead from you when you found it?

A. Oh, I would say along in the vicinity of maybe twelve to fifteen feet from me.

Q. And you testified yesterday in steps?

A. Well, I believe I did, sir. I'll say approximately eight or ten steps. I still say twelve to fifteen feet.

Q. How wide an area were you people searching on both sides of the road?

A. Well, sir, we were searching an area from the shoulder or the edge of the black-top, which doesn't necessarily mean we were walking at the edge of the black-top, but I would say we were covering an area of about from the edge of the black-top to approximately twenty feet.

Q. Were all of you in line abreast?

A. Well, sir, I would say most of the time we were, but I wouldn't say 100% of the time we were in a straight line.

Q. Where were you walking in relation to the other prisoners that you were searching each side of the road?

A. Well, if you mean in position as being abreast, sometimes I would be near the black-top or would be on the off side of it. We didn't have no permanent position.

Q. How many were searching that side?

A. Well, it was a minimum of three at all times.

Q. Sometimes less and sometimes more?

A. No, sir, never less.

Q. Never less than three?

A. No, sir.

Q. Did you maintain your position fairly well? That is, if you were walking along the side of the road, and there was a middle man and an outside man, did you always maintain your position going along the ditch?

A. The best we could, sir. We'd come to a ditch or something and we'd break ranks, so to speak, but we maintained as uniform position as we could.

Q. The point where you claim you found the shell, how wide was the right-of-way there—the cleared right-of-way?

A. At the point of the shell I would say it was clear for at least probably thirty feet. That's not smooth and level, but it was clear.

Q. Did it have a ditch? Water in it?

A. Yes, sir, it's a fill off the shoulder, it wasn't level, but I would say it was about thirty feet clear.

Q. And when you sighted this shotgun shell you told everybody, "Don't touch it"? And give him time to get the camera man and take a picture?

A. That was the instructions, sir, before we ever left the automobile that morning, that no one was to touch any object.

Q. Who gave you that instruction in the automobile?

A. I gave those instructions, sir, as well as my partner to the prisoners.

Q. You all gave them.

A. Yes, sir.

Mr. Esco: I believe that's all.

Mr. McLeod: Come down, Mr. Crocker.

[fol. 94] ROBERT B. FINLEY, being duly sworn, testified as follows:

Direct examination.

By Mr. McLeod:

Q. What is your name?

A. Robert Finley.

Q. What is your occupation?

A. I am with the State Department of Toxicology, Criminal Investigation.

Q. Is your position what is known as a criminalist?

A. Yes, sir.

Q. What is a criminalist, Mr. Finley?

A. A criminalist in the State of Alabama is one that examines and interprets physical evidence.

Q. What are your qualifications to be a criminalist in the State of Alabama, Mr. Finley?

A. I have a bachelor of science degree from Jackson State College and four and a half years in the Department.

Q. Who did you—you said experience, does that mean under the supervision of someone else? A. Yes, sir.

Q. Under whose supervision were you, Mr. Finley?

A. Dr. C. J. Rehling, head of the State toxicologists and also the director of the State Department of Toxicology and Criminal Investigation; Mr. Paul Shoffeitt, who is assistant director of the Department; Mr. Nelson E. Grubbs, who is head of the Mobile Division; Mr. Robert Johnson, who is head of the Birmingham Division; Mr. William McVay, who is head of our Huntsville office; Mr. W. L. Sowell, who is now directing his own department in Fort Worth, Texas.

Q. Mr. Finley, I will show you a hull here, which is marked for identification as State's Exhibit No. 2, and ask you do you recognize that?

A. Yes, sir.

Q. And where did you see that before?

A. On Alabama Highway No. 5.

Q. Describe where it was when you saw it.

A. It was located on the side of the pavement on Alabama No. 5 traveling in the direction of north.

Q. I will show you a picture here which is marked for identification purposes as Plaintiff's Exhibit No. 16 and ask you do you recognize that picture?

A. Yes.

Q. Who made that picture?

A. I did.

Q. Who developed it?

A. I did.

Q. And from the time that you developed it has that picture been in your possession until you brought it into this Court?

A. Yes, sir.

Q. Does that picture depict the true scene of the shell as you saw it on Highway 5?

A. Yes, sir.

OFFERS IN EVIDENCE

Mr. McLeod: State would like to offer in evidence Plaintiff's Exhibit No. 16 as testified to by Mr. Finley.

Mr. Esco: No objection.

(Above described picture admitted in evidence without objection as Plaintiff's Exhibit 16, and as it cannot be conveniently copied into the record is sent to the Supreme Court as original evidence.)

Q. I will show you a picture marked for identification purposes as Plaintiff's Exhibit No. 15, and ask you do you recognize that picture?

A. Yes, sir.

[fol. 95] Q. Who made that picture?

A. I did.

Q. Who developed that picture?

A. I did.

Q. From the time you developed this picture until you brought it into this court room today has it been in your possession?

A. Yes, sir.

Q. What does that picture depict?

A. Picture of the hull and initials by Deputy L. C. Crocker.

Mr. McLeod: State would like to offer in evidence Plaintiff's Exhibit No. 15, which is a picture showing the initials of Mr. Crocker.

Mr. Esco: I object to that picture, your Honor. We have in evidence one picture showing the locale of finding the shell, and any other pictures of that same shell would be prejudicial.

Q. Is that the true—a true representation of the hull that you found on Highway 5 with the exception of the initials "L.C.C." on it and your initials at the top?

A. Yes.

Mr. McLeod: State would like to offer this in evidence as State's Exhibit No. 15, your Honor.

Mr. Esco: We object, your Honor. This evidence is already in, picture of the locale where the shell was found.

There is no background in this picture, where it was taken, or anything about it.

The Court: Overrule.

Mr. Esco: We except.

(Above described picture admitted in evidence as Plaintiff's Exhibit 15, and as it cannot be conveniently copied into the record is sent to the Supreme Court as original evidence.)

Q. I will show you a picture that is marked for identification purposes as Plaintiff's Exhibit No. 14, and ask you do you recognize that picture?

A. Yes.

Q. What is that a picture of, Mr. Finley?

A. That is the hull that was found on the side of Highway No. 5 showing the crimped end.

Q. Was it crimped in when you got it?

A. Yes.

Q. Who made that picture?

A. I did.

Q. Who developed that picture?

A. I did.

Q. From the time you developed that picture has it been in your possession until you brought it into this court room?

A. Yes, sir.

Q. Does that picture depict the true scene of the shell, as it was found on Highway No. 5?

A. Yes, sir.

Mr. McLeod: State would like to offer in evidence Plaintiff's Exhibit No. 14, as testified to by Mr. Finley.

Mr. Esco: We object, your Honor. This is prejudicial, repetitious; two photographs have already been introduced.

The Court: Overrule.

Mr. Esco: We except.

[fol. 96] (Above described picture admitted in evidence as Plaintiff's Exhibit 14, and as it cannot be conveniently copied into the record is sent to the Supreme Court as original evidence.)

Q. Mr. Finley, on January 19, 1962—wait a minute—on January 18, 1962, were you called to Selma, Alabama, to assist in the investigation of a case?

A. Yes, sir.

Q. Did you check a tractor that had been shot into?

A. Yes.

Q. Where did you see that tractor?

A. At the truck stop at the intersection of No. 80 and Alabama No. 5, Browns' Truck Stop I believe it is called.

Q. Did you, under your instructions, have that tractor moved into Selma, Alabama?

A. Yes.

Q. Did you take a picture of it?

A. Yes.

Q. I will show you a picture which is marked for identification purposes as Plaintiff's Exhibit No. 32, and ask you do you recognize that picture?

A. Yes.

Q. Who made that picture?

A. I did.

Q. Who developed that picture?

A. I did.

Q. Has that picture been in your possession since it was developed until you brought it into this court room today?

A. Yes.

Q. And does that picture depict the true scene of the truck of the tractor that you checked on January 18, 1962?

A. Yes.

Mr. McLeod: State would like to introduce in evidence Plaintiff's Exhibit No. 32, as testified to by Mr. Finley as being the tractor that was involved in the crime on Highway 5 on January 18, 1962.

Mr. Esco: We are going to object, your Honor, on the grounds that the person shown here, drawing attention to particular matters in this picture, more to the picture than the account brought out here, and one particular person standing at the place which may be prejudicial.

The Court: Overrule.

Mr. Esco: We except, if you please.

(Above described picture admitted in evidence as Plaintiff's Exhibit 32, and as it cannot be conveniently copied

into the record is sent to the Supreme Court as original evidence)

Q. Mr. Finley, I show you a picture that is marked for identification purposes as State's Exhibit No. 33, and ask you do you recognize that picture?

A. Yes.

Q. Who made that picture?

A. I did.

Q. Who developed that picture?

A. I did.

Q. Has that picture been in your possession from the time you developed it until the time you brought it into Court here today?

A. Yes.

Q. What does that picture depict, Mr. Finley?

A. The opening in the left door of the tractor.

Mr. McLeod: State would like to offer in evidence Plaintiff's Exhibit No. 33 as being the truck and the place where the tractor was shot into.

Mr. Esco: We have no objection, your Honor.

(Above described picture admitted in evidence without objection as Plaintiff's Exhibit 33, and as it cannot be conveniently copied into the record is sent to the Supreme Court as original evidence.)

Q. I show you a picture that is marked for identification purpose as Plaintiff's Exhibit No. 6, and ask you do you recognize that?

A. Yes.

Q. Who made that picture?

A. I did.

Q. Who developed that picture?

A. I did.

Q. Has that picture been in your possession from the time you developed it until you brought it into the court room today?

A. Yes, sir.

Q. What does that picture depict, Mr. Finley?

A. The opening in the left door of this tractor.

Q. Does that picture depict the true scene?

A. Yes, sir.

Mr. McLeod: State would like to offer in evidence as State's Exhibit No. 6 the picture just testified to by Mr. Finley.

Mr. Esco: Now we object to the introduction of any further pictures of this same scene as the last exhibit that was introduced, your Honor. Pictures of that same scene are simply repetitions and tend to prejudice this jury.

The Court: Overrule.

Mr. Esco: We except, if you please.

(Above described picture admitted in evidence as Plaintiff's Exhibit 6, and as it cannot be conveniently copied into the record is sent to the Supreme Court as original evidence.)

Q. I show you a picture which is marked for identification as Plaintiff's Exhibit No. 12, and ask you do you recognize that picture?

A. Yes.

Q. Who made that picture?

A. I did.

Q. Who developed that picture?

A. I did.

Q. Has that picture been in your possession from the time you developed it until you brought it into this court room?

A. Yes.

Q. And does that picture depict the true scene of the tractor involved in the shooting here in Dallas County, Alabama?

A. Yes.

Mr. McLeod: State would like to offer in evidence Plaintiff's Exhibit No. 12, as testified to by Mr. Finley.

Mr. Esco: Same objection.

The Court: Overrule.

Mr. Esco: We except.

(Above described picture admitted in evidence as Plaintiff's Exhibit 12, and as it cannot be conveniently copied into the record is sent to the Supreme Court as original [fol. 98] evidence.)

Q. Mr. Finley, I will show you a picture which is marked for identification purposes as Plaintiff's Exhibit No. 13, and ask you do you recognize that picture?

A. Yes.

Q. Who made that picture?

A. I did.

Q. Who developed that picture?

A. I did.

Q. And whose possession has that picture been in from the time that you developed it until the time you brought it into this court room?

A. Mine.

Q. And what does that picture depict, Mr. Finley?

A. This is a photograph of the opening in the left door of the tractor.

Q. And does that picture depict the true scene of that hole in the tractor, as you saw it that day?

A. Yes, sir.

Mr. McLeod: State would like to offer in evidence Plaintiff's Exhibit No. 13, as testified to by Mr. Finley.

Mr. Esco: Same objection, if you please.

The Court: Overrule.

Mr. Esco: We except.

Q. Mr. Finley, on the next day, Friday, January 19th, did you have occasion to check an automobile in Montgomery, Alabama, at the Highway Patrol station?

A. Yes.

Q. Who was present when you checked that automobile, Mr. Finley?

A. Chief W. R. Jones, Captain Robert Gedwin, Lt. Ralph Holmes, and several other Patrol personnel.

Q. What kind of vehicle was it that you checked?

A. 1959 White Ford.

Q. I will show you a picture here, which is marked for identification as Plaintiff's Exhibit No. 5, and ask you do you recognize that picture?

A. Yes.

Q. Who took that picture?

A. I did.

Q. Who developed that picture?

A. I did.

Q. And has that picture been in your possession from that day until you brought it into Court here today?

A. Yes.

Q. And what does that picture depict, Mr. Finley?

A. A 1959 Ford.

Q. Is that the Ford that you are talking about that you examined in Montgomery, Alabama?

A. Yes.

Mr. McLeod: State would like to offer in evidence Plaintiff's Exhibit No. 5, which is a picture of the 1959 white Galaxie Ford, as just testified to by Mr. Finley.

Mr. Esco: We would like to know the purpose of the introduction of this picture. If the prosecution would tell us, we might not object.

Mr. McLeod: For the purpose of showing the jury the vehicle that was involved.

Mr. Esco: The vehicle you claim was involved.

Mr. McLeod: That was testified from the stand here as being involved.

Mr. Esco: Did this man see this automobile at the scene? [fol. 99] Mr. McLeod: I have made no contention that Mr. Finley saw it.

Mr. Esco: I say that it has no probative value, your Honor, whatsoever as to the incident here for which the defendant is being tried—a white Fairlane automobile shown in a garage with numerous details behind it, background is strange, we know nothing about the background or what's in there or whether or not anything in there would be prejudicial. And we say that it has no probative value.

The Court: Overrule.

Mr. Esco: We except, if you please.

(Above described picture admitted in evidence as Plaintiff's Exhibit No. 5, and as it cannot be conveniently copied into the record is sent to the Supreme Court as original evidence.)

Q. I will show you a picture that is marked for identification as Plaintiff's Exhibit No. 7, and ask you do you recognize that picture?

A. Yes.

Q. Who made that picture?

A. I did.

Q. Who developed that picture?

A. I did.

Q. Has that picture been in your possession from the time you developed it until you brought it into this court room?

A. Yes.

Q. What does that picture depict, Mr. Finley?

A. It shows the fender protector cloth in which the rifle was wrapped up in, between the grill and the radiator of this automobile.

Q. And does that picture depict the true scene of where this rifle was located in this automobile?

A. Yes.

Mr. McLeod: State would like to offer in evidence Plaintiff's Exhibit No. 7, as testified to by Mr. Finley.

Mr. Esco: If your Honor please, we object to this. No predicate laid, no evidence in this trial whatsoever that any rifle was used in this incident to which this defendant is charged. We claim that this is immaterial, irrelevant, used for prejudicial purposes, has no probative value whatsoever in this case. If this is admitted into evidence and shown the jury it would be highly prejudicial to the rights of this defendant.

The Court: Overrule.

Mr. Esco: We except, if you please.

(Above described picture admitted in evidence as Plaintiff's Exhibit 7, and as it cannot be conveniently copied into the record is sent to the Supreme Court as original evidence.)

Q. Mr. Finley, I will show you a picture that is marked for identification purposes as Plaintiff's Exhibit No. 4, and ask you do you recognize that picture?

A. Yes.

Q. Who made that picture?

A. I did.

Q. Who developed that picture?

A. I did.

[fol. 100] Q. Has it been in your possession from the time you developed it until you brought it into this court room?

A. Yes.

Q. What does that picture depict?

A. It shows the fender protector cloth in which the rifle was wrapped between the grill and the radiator of this 1959 Ford automobile.

Q. Does that picture depict the true scene as you saw it there the day you took that picture?

A. Yes.

Mr. McLeod: State would like to offer in evidence Plaintiff's Exhibit No. 4, the picture as just testified to by Mr. Finley.

Mr. Esco: If your Honor please, we object to the introduction of this photograph on the grounds that it is immaterial, irrelevant, no proper predicate has been laid, and not shown that any rifle has been involved in this incident whatsoever, and this picture is introduced for prejudicial purposes only.

The Court: Overrule.

Mr. Esco: We except, if you please.

(Above described picture admitted in evidence as Plaintiff's Exhibit 4, and as it cannot be conveniently copied into the record is sent to the Supreme Court as original evidence.)

Q. I show you a picture that is marked for identification purposes as Plaintiff's Exhibit No. 3, and ask you do you recognize that picture?

A. Yes.

Q. Who made that picture?

A. I did.

Q. Who developed that picture?

A. I did.

Q. Has this picture been in your possession from the time you developed it until you brought it into this court room?

A. Yes.

Q. What does that picture show, Mr. Finley?

A. A piece of black tape over the interior light switch, which turns the light on when the door is open and shuts it off when the door is closed.

Q. Does that picture depict the true scene of what you saw in there with this tape over that hook as you saw it that day?

A. Yes.

Mr. McLeod: State would like to offer in evidence Plaintiff's Exhibit No. 3, the picture just testified to by Mr. Finley.

Mr. Esco: Now if your Honor please, we object to this very strenuously. I don't know what it proves. There is no evidence here whatsoever that this has anything to do with this case at all, or that it tends to prove anything. We claim it is immaterial, irrelevant, and we certainly insist that it is highly prejudicial. It insinuates something there is no testimony to at all, and that by pure insinuation it is prejudicial.

The Court: Overrule.

Mr. Esco: We except, if you please.

(Above described picture admitted in evidence as Plaintiff's Exhibit 3, and as it cannot be conveniently copied into the record is sent to the Supreme Court as original evidence.)

Q. I will show you a rifle that is marked for identification purposes as Plaintiff's Exhibit No. 25 and ask you do you recognize that rifle?

A. Yes.

Q. Where did you first see that rifle?

A. It was wrapped in a fender protector cloth located between the grill and the radiator of this 1959 Ford automobile.

Q. At the time that you saw this rifle did you take possession of it?

A. Yes.

Q. Has it been in your possession from the time that you took possession of it until you brought it into this court room?

A. Yes.

Mr. McLeod: State would like to offer in evidence as Plaintiff's Exhibit No. 25 the rifle that was just testified to by Mr. Finley.

Mr. Esco: If your Honor please, we object to the introduction of any guns, other than the gun claimed to be used in this incident, as being immaterial, irrelevant and highly prejudicial to the trial of this case. We can see no con-

nnection in the piling up of a lot of guns before this jury, when only one shot was fired and only one gun was used.

The Court: Overrule.

Mr. Esco: We except, if you please.

(Above described rifle admitted in evidence as Plaintiff's Exhibit 25, and as it cannot be copied into the record is sent to the Supreme Court as original evidence.)

Q. Mr. Finley, I will show you a fender protector cloth marked for identification purposes as Plaintiff's Exhibit No. 22, and ask you do you recognize that?

A. Yes.

Q. Are those your initials on there?

A. Yes.

Q. Where did you find this fender protector cloth, Mr. Finley?

A. That's what the rifle was wrapped in, located between the grill and the radiator of this 1959 white Ford automobile.

Q. Mr. Finley, from the time you found this has it been in your possession from that day until you brought it into this court room?

A. Yes.

Mr. McLeod: State would like to offer in evidence as Plaintiff's Exhibit No. 22 this fender protector cloth which Mr. Finley has just testified to as being the one he found with the rifle wrapped in located between the grill and the radiator of the 1959 Galaxie Ford.

Mr. Esco: We'd like to offer the same objection as we offered to the previous exhibit, your Honor.

The Court: Overrule.

Mr. Esco: We except, if you please.

(Above described fender protector cloth admitted in evidence as Plaintiff's Exhibit 22, and as it cannot be copied into the record is sent to the Supreme Court as original evidence.)

[fol. 102] Q. Mr. Finley, I will show you a shotgun that is marked for identification purposes as Plaintiff's Exhibit 26, and ask you do you recognize that gun?

A. Yes.

Q. Where did you first see that gun, Mr. Finley?

A. On the back seat of this 1959 Ford automobile.

Q. And did you take possession of that rifle—I mean of that shotgun at that time?

A. Yes.

Q. Has it been in your possession from that day until you brought it into this court room today?

A. Yes.

Mr. McLeod: State would like to offer in evidence as Plaintiff's Exhibit No. 26 this J. C. Higgins shotgun, as just testified to by Mr. Finley as being the one he found on the seat of the automobile, of the 1959 Galaxie Ford.

Mr. Esco: We make the same objection as before, your Honor. We feel this is highly prejudicial.

The Court: Overrule.

Mr. Esco: We except, if you please.

(Above described shotgun admitted in evidence as Plaintiff's Exhibit 26, and as it cannot be copied into the record is sent to the Supreme Court as original evidence.)

Q. Mr. Finley, I show you a shotgun here that is marked for identification as Plaintiff's Exhibit No. 27, and ask you do you recognize that gun?

A. Yes.

Q. Where did you first see that gun, Mr. Finley?

A. I removed this gun from the back seat of this 1959 Ford automobile.

Q. And from the time that you removed it there, has it been in your possession until you brought it in the court room here in Dallas County, Alabama?

A. Yes.

Mr. McLeod: State would like to offer in evidence Plaintiff's Exhibit No. 27, which is the Winchester rifle as testified to by Mr. Finley that he found in this 1959 Galaxie Ford.

Mr. Esco: The defense has no objection, your Honor.

(Above described shotgun admitted in evidence as Plaintiff's Exhibit 27, without objection, and as it cannot be copied into the record is sent to the Supreme Court as original evidence.)

Q. Mr. Finley, you testified a while ago that a hull was turned over to you by Mr. L. C. Crocker—

Mr. Esco: (Interrupting.) Now, if you please, we'd rather that the jury did not see those until they are admitted into evidence.

Q. Did you check that shell against a shell that was fired in Plaintiff's Exhibit No. 27, which is the Winchester rifle —shotgun?

Mr. Esco: Your Honor, please, at this time we would like to object to any testimony regarding ballistics until the man is qualified as an expert.

Mr. McLeod: I am not attempting to qualify Mr. Finley [fol. 103] as a ballistics expert. He is not a ballistics expert. Mr. Finley is a firearms identification expert, and there is a difference between a firearms identification expert and a ballistics expert.

Mr. Esco: There is a vast difference.

The Court: Do you want to take him on voir dire?

Mr. Esco: Yes, sir.

Voir dire examination.

By Mr. Esco:

Q. Are you, sir, an expert in ballistics?

A. No, sir.

Q. In the field of ballistics?

A. No, sir.

Q. Have you had any studies in that field?

A. No, sir.

Mr. Esco: Then we object to his testifying, your Honor, as to anything involving ballistics, shells, the markings on shells, or the markings made by guns on shells, or to any markings made on shells by guns.

Mr. McLeod: Your Honor, if you will withhold your ruling temporarily I will qualify him.

The Court: All right.

Redirect examination.

By Mr. McLeod:

Q. Mr. Finley, you say that you are not a ballistics expert.

A. No, sir.

Q. Are you a firearms identification expert?

A. That's not for me to decide. That is for the jury to decide.

Q. Mr. Finley, I will ask you the question: have you had any training in firearms identification?

A. Yes.

Q. And how many firearms have you tested, Mr. Finley, in time you have had that, and what experience have you had?

A. I would say from 150 to 200 shotguns.

Q. How many firearms?

A. From 400 to 500.

Q. And you testified previously that you had had training under numerous experts, namely, Dr. C. J. Rehling, Toxicologist of the State of Alabama, Dr. Paul Shoffeitt, assistant toxicologist for the State of Alabama, Dr. Nelson Grubbs, in charge of the Mobile office of the Department of Toxicology of the State of Alabama, Mr. Robert Johnson, who is in charge of the Toxicology Department for the Birmingham District, Mr. McVay, who is in charge of the Huntsville Division for the State of Alabama, and Mr. W. L. Sowell, who is at the present time chief for the Fort Worth, Texas, Police Department, you studied under all of them?

A. Yes, sir.

Q. And how many years have you studied under them?

A. Four and a half years.

[fol. 104] Q. And during that time you say you have tested between 400 and 500 fire arms?

A. Yes, sir.

Q. And during that time, of that 400 or 500 was 150 or 200 shotguns?

A. Yes, sir.

Mr. Esco: Your Honor, please, I'd like to cross-examine.
The Court: Yes, sir.

Cross examination.

By Mr. Esco:

Q. In these studies, Mr. Finley, have you attended any regular class or class hours?

A. In studying I did four years previous study to prepare me for the criminalistic field.

Q. You have a BS degree, I believe?

A. Yes.

Q. Where is that from?

A. Jackson State College.

Q. Jackson State College, and you have a BS degree.

A. Yes.

Q. Well, did you study ballistics or fire arms identification there?

A. No.

Q. I'm asking you in the field of ballistics and fire arms identification have you attended any regular class rooms at any certified institution or been instructed by any properly certified professors in that field?

A. No, sir.

Mr. Esco: We submit to your Honor that this man is not an expert in the field of fire arms identification or ballistics.

The Court: Objection is overruled.

Mr. Esco: We except, if you please.

Redirect examination.

By Mr. McLeod:

Q. Mr. Finley, you were asked awhile ago if you were an expert in ballistics. I believe you testified that you were not.

A. That's right.

Q. Isn't ballistics the science of the projectiles in flight?

A. Yes.

Q. Now a fire arms identification expert is one that checks to see if a particular shell was fired from a particular gun?

A. Yes, sir.

Q. Now, Mr. Finley, on Plaintiff's Exhibit No. 27, which is the Winchester shotgun, did you fire a test shell from that gun and compare it with Plaintiff's Exhibit No. 2 which you found on Highway No. 5?

A. Yes.

Q. Mr. Finley, when you checked that shotgun did you find an outstanding defect in it?

A. Yes.

Q. Now, Mr. Finley, I will show you a picture that is marked for identification purpose as Plaintiff's Exhibit No. 30, and ask you what is that picture?

A. That's a picture of the face of the bolt of this Winchester shotgun.

Q. Now, when you mention the face of the bolt, you mean what part there?

[fol. 105] A. This bolt here (pointing).

Q. That back end of the shell is against it, isn't it?

A. Yes.

Q. Now, did you find a defect in this particular shotgun?

A. Yes.

Q. And who made this picture?

A. I did.

Q. Who developed it?

A. I did.

Q. Has it been in your possession from that day until you came into this court room?

A. Yes.

Q. Does this picture depict the true scene of the bolt of Plaintiff's Exhibit No. 27, which is the Winchester shotgun you have in your hand?

A. Yes.

OFFERS IN EVIDENCE

Mr. McLeod: State would like to offer in evidence as Plaintiff's Exhibit No. 30, which is a picture of the bolt of this gun as testified to by Mr. Finley.

(Above described picture admitted in evidence without objection as Plaintiff's Exhibit 30, and as it cannot be conveniently copied into the record is sent to the Supreme Court as original evidence.)

Q. Mr. Finley, will you come down before the jury and point out to the jury the defect that you found in that shotgun?

A. (Witness stands before the jury.) This is the bolt. The firing pin on the bolt has this small defect. When the gun is fired that imprint is left on the hull.

Q. (Witness returns to the witness stand.) Mr. Finley, I will show you a picture that is marked for identification purposes as Plaintiff's Exhibit No. 28, and ask you do you recognize that picture?

A. Yes.

Q. Who made that picture?

A. I did.

Q. Who developed that picture?

A. I did.

Q. Has that picture been in your possession from the time you developed it until you brought it into this court room?

A. Yes.

Q. What does that picture depict, Mr. Finley?

A. This is a photograph of this portion of the hull that was found on the highway, Alabama No. 5.

Q. Now, is this picture an enlarged picture of that?

A. Yes.

Mr. McLeod: State would like to offer in evidence as Plaintiff's Exhibit No. 28, the picture of the base of the hull Plaintiff's No. 2.

(Above described picture admitted in evidence without objection as Plaintiff's Exhibit 28, and as it cannot be conveniently copied into the record is sent to the Supreme Court as original evidence.)

Q. Mr. Finley, I show you a picture that has been marked for identification purposes as Plaintiff's Exhibit No. 29, and ask you do you recognize that picture?

A. Yes.

Q. What is that a picture of, Mr. Finley?

A. That is a picture of the test hull which I fired in this shotgun.

Q. And who made that picture?

A. I did.

Q. Who developed that picture?

A. I did.

Q. Has it been in your possession from that time until the time you brought it into this court room?

[fol. 106] A. Yes.

Mr. McLeod: State would like to offer in evidence at this time Plaintiff's Exhibit No. 29, as testified to by Mr. Finley as being the hull of the test bullet as fired in Plaintiff's Exhibit No. 27.

Mr. Esco: If your Honor please, we object to the exhibit and move to exclude the testimony regarding it due to the fact no proper predicate has been laid as to the conditions under which it had been fired, and the conditions of how the gun was handled, the way it was handled, climatic conditions, who handled it, where, and whether or not it was fired under the same identical conditions as the comparison bullet.

The Court: Objection is overruled.

Mr. Esco: We except, if you please.

(Above described picture admitted in evidence as Plaintiff's Exhibit 29, and as it could not be conveniently copied into the record is sent to the Supreme Court as original evidence.)

Q. Mr. Finley, I'd like for you to come down before the jury. (Witness stands before the jury.) You told me that No. 28 was a picture of the hull that you found on the highway.

A. Yes, sir.

Q. Now, will you turn that around to the jury and this defect that you showed them awhile ago, will you show them the marking of that defect on the hull that you found on Highway 5?

A. Now these two marks, this is the imprint (indicating) of the defect on this hull at the time of the discharge.

Q. Mr. Finley, I will show you Plaintiff's Exhibit No. 29, which you testified to as being the test hull that you fired from Plaintiff's Exhibit No. 27, and did you find that same marking on it?

A. Yes, sir. This is the mark here (indicating) and this is the defect here which was left on the hull when fired.

(Witness returns to the witness stand.)

The Court: The Court will now stand in recess for a few minutes.

(Court stands in recess for a few minutes, and the jury retires to the jury room.)

(Jury returns to the jury box, and Mr. Finley returns to the witness stand.)

Q. Mr. Finley, on the bolt in there (indicating Winchester shotgun, Plaintiff's Exhibit 27) where this defect is—can you take that apart, so we can see it?

A. Yes, sir. (Witness takes gun apart and removes said bolt.)

Q. Mr. Finley, will you bring that over to the jury, please, sir, for the benefit of the jury, as you testify to it?

A. (Witness stands before the jury.) This is the ejector located here, and the firing pin, and the defect is right here. (Witness returns to the witness stand.)

Q. Mr. Finley, you testified awhile ago that Plaintiff's Exhibit No. 2 was the shell that you found on Highway 5 and was the shell that you took into your possession there, [fol. 107] and Mr. Crocker and yourself initialled it together at the same time.

A. Yes, sir.

Mr. McLeod: The State would like to offer in evidence now as State's Exhibit No. 2 the hull that was testified to by Mr. Crocker and Mr. Finley as being the hull they found on Highway 5 on January 21, 1962.

(Above described hull admitted in evidence without objection as Plaintiff's Exhibit 2, and as it cannot be copied into the record is sent to the Supreme Court as original evidence.)

Q. Mr. Finley, I will show you a picture here that is marked for identification purpose as Plaintiff's Exhibit No. 31 and ask you do you recognize that picture?

A. Yes.

Q. Who made that picture?

A. I did.

Q. Who developed that picture?

A. I did.

Q. And from the time you developed it until you brought it into this court room has it been in your possession?

A. Yes.

Q. What does that picture depict, Mr. Finley?

A. This is a picture, showing the evidence hull which was found on the side of the highway and the test hull which I fired in that particular shotgun, shows the comparison of the two.

Q. And does that picture depict the true scene of the face of the hulls, of the test shell and of the shell that you found on the highway?

A. Yes.

Mr. McLeod: State would like to offer in evidence as Plaintiff's Exhibit No. 31 the big picture as just testified to by Mr. Finley.

Mr. Esco: If your Honor please, we object and move to exclude the testimony on the grounds no proper predicate has been laid and the conditions under which the test shell and this comparison photo were made.

The Court: Overrule.

Mr. Esco: We except, if you please.

(Above described picture admitted in evidence as Plaintiff's Exhibit 31, and as it cannot be conveniently copied into the record is sent to the Supreme Court as original evidence.)

Q. Mr. Finley, will you show that picture to the jury and explain it to them?

A. (The witness stands before the jury.) On all firearms there are markings that are true marks and which when a shell is fired in a particular weapon those marks are left on the shell. So we can take a questioned shell and a test shell which we fired from a weapon—in this case, a shotgun—and under a double microscope, each one under a separate microscope in which they are connected, enabling us to see a portion of each hull at the same time. These markings, true markings that are on the weapon, are left on the hull when the shell is fired. If we are able to match up these markings where they will continue across the split image here (indicating)—in other words, this being the test round which I fired and this is the test hull which

was found on the highway, if we are able to show a continuation of these markings that is indication that the evidence hull was fired in the particular shotgun in question.

Q. Now, from your checking of that, are the markings similar?

A. Yes, sir.

[fol. 108] Q. And from this test that you ran and other tests, are you of the opinion that the hull that you found on the highway, Highway No. 5, and the test hull were both fired from the same shotgun?

A. It is my opinion that they both were, that the hull found on Highway 5 was fired from this shotgun.

Mr. Esco: If your Honor please, we move to exclude on the grounds that this man has not been qualified as an expert in the field in which he is now testifying. We move to exclude his testimony.

The Court: Overrule.

Mr. Esco: We except, if you please.

Q. Mr. Finley, at the time that you checked this automobile, this 1959 white Galaxie Ford, in Montgomery, I will show you Plaintiff's Exhibit No. 18 and ask you do you recognize that?

A. Yes.

Q. Where did you find that?

A. In the left floor board of the front seat on the driver's side of this 1959 Galaxie Ford.

Q. And did you take possession of this?

A. Yes.

Q. And has it been in your possession from the time you found it in that Galaxie Ford until you brought it into this court room?

A. Yes.

Mr. McLeod: State would like to offer in evidence as Plaintiff's Exhibit No. 18 one automobile tag No. 1A-37056, 1962, Alabama—as Plaintiff's Exhibit No. 18.

Mr. Esco: If your Honor please, we're going to object on the grounds that this examination was made and this item was found in an automobile that had been out of the possession and out of the view of this defendant some thirty-two hours. It has been in the hands of numerous and vari-

ous officers and officials and Lord knows who. This man has got it about third or fourth or fifth or sixth hand, got it some thirty-two hours after it was originally picked up.

The Court: Overrule.

Mr. Esco: We except, if you please.

(Above described automobile license tag admitted in evidence as Plaintiff's Exhibit 18, and as it cannot be copied into the record is sent to the Supreme Court as original evidence.)

Q. Mr. Finley, when you checked this tag did you find any fresh markings on it?

A. Yes, sir, around the holes which are used for mounting purposes of this tag, I found evidence that paint had been flaked off recently.

Q. Now, Mr. Finley, from the time that you had that tag in your possession, did you do anything to this to keep those marks from rusting?

A. I preserved it as I found it.

Q. And how did you preserve it?

A. By putting it in a plastic bag to keep anything from scratching it or in other words from chipping any more paint than was chipped off when I got it.

Q. And did you take that plastic bag off in this court room in the presence of the Court?

[fol. 109] A. Yes.

Q. And without doing that, would these marks have shown rust?

A. Possibly.

Mr. Esco: We object. He is not qualified.

The Court: Yes, sir, sustain the objection.

Q. Well, by doing that, by what you did, did that retain that tag in the same condition as it was when you got it out of the car?

A. Yes.

Q. Mr. Finley, I show you a gun case marked for identification as Plaintiff's Exhibit No. 24, and ask you do you recognize that?

A. Yes.

Q. Where did you find that, Mr. Finley?

A. On the back seat of this 1959 Ford automobile.

Q. Was anything in it?

A. Yes, sir.

Q. What was in it?

A. Winchester automatic shotgun.

Q. And has this been in your possession from the time that you found it in this automobile until you brought it into this court room?

A. Yes.

Mr. McLeod: State would like to offer in evidence Plaintiff's Exhibit No. 24, one gun case testified to by Mr. Finley.

Mr. Esco: There is no objection, your Honor.

(Above described gun case admitted in evidence without objection as Plaintiff's Exhibit 24, and as it cannot be copied into the record is sent to the Supreme Court as original evidence.)

Q. I will show you a gun case marked for identification purposes as Plaintiff's Exhibit No. 23, and ask you do you recognize that?

A. Yes.

Q. Where did you get that?

A. Back seat of this 1959 Ford automobile.

Q. Was anything in it?

A. Yes.

Q. What was in it?

A. J. C. Higgins pump shotgun.

Q. Has it been in your possession from the time you found it in that automobile until you brought it into this court room?

A. Yes.

Mr. McLeod: State would like to offer in evidence as Plaintiff's Exhibit No. 23 one gun case, as testified to by Mr. Finley.

Mr. Esco: If your Honor please, we object to this and move to exclude the evidence on the grounds that it is claimed here that one shot was fired out of an automatic shotgun. He is testifying to something containing a pump gun, and there is no contention and no evidence that that gun was used in the crime with which this man is charged.

The Court: Overrule.

Mr. Esco: We object further on the grounds it is prejudicial.

The Court: Overrule.

Mr. Esco: We except, if you please.

(Above described gun case admitted in evidence as Plaintiff's Exhibit 23, and as it cannot be copied into the record, it is sent to the Supreme Court as original evidence.)

[fol. 110] Q. Mr. Finley, I will show you a yellow sack with a shell box inside of it with shells on the inside of the box, which is marked for identification as Plaintiff's Exhibit No. 19, and ask you do you recognize that?

A. Yes.

Q. Where did you find that, Mr. Finley?

A. Over behind the left rear wheel of this 1959 Galaxie Ford automobile in the trunk.

Q. And has it been in your possession from the time that you found it there in that automobile until you brought it into this court room?

A. Yes.

Mr. McLeod: State would like to offer in evidence Plaintiff's Exhibit No. 19, one yellow sack and one Peters shell box with shells inside, as Plaintiff's Exhibit No. 19.

(Above described sack, box and shells admitted in evidence without objection as Plaintiff's Exhibit 19.)

Q. Mr. Finley, I will show you Plaintiff's Exhibit No. 21, which is a box with an ammo belt and ammunition, loaded with ammunition, and ask you do you recognize that?

A. Yes.

Q. Where did you find that?

A. Over behind the right rear wheel well of this 1959 Ford automobile in the trunk.

Q. Has this ammo belt been in your possession from the time you found it in that automobile until you brought it into this court room?

A. Yes.

Mr. McLeod: State would like to offer in evidence Plaintiff's Exhibit No. 21, one white box with an ammo belt loaded with ammunition.

Mr. Esco: If your Honor please, we object on the grounds that this man did not search this car until some thirty-two

hours after it was taken out of the sight and possession of this defendant; that many, many person had had access to it prior to the time that he examined it. Anything could have been put in it or taken out of it.

The Court: Overrule.

Mr. Esco: We except if you please.

(Above described box, amniobelt and ammunition admitted in evidence as Plaintiff's Exhibit 21, and as they cannot be copied into the record are sent to the Supreme Court as original evidence.)

Q. Mr. Finley, I will show you a shotgun cleaning outfit which is marked for identification purposes as Plaintiff's Exhibit 20, and ask you do you recognize that?

A. Yes.

Q. Where did you find that, Mr. Finley?

A. In the back floor boards of this 1959 Ford automobile.

Q. And has it been in your possession from that day until you brought it into this court room?

A. Yes.

Mr. McLeod: State would like to offer in evidence Plaintiff's Exhibit No. 20, one shotgun cleaning outfit as just testified to by Mr. Finley.

Mr. Esco: We offer the same objection as we gave to the last exhibit.

[fol. 111] The Court: Overrule.

Mr. Esco: We except, if you please.

(Above described shotgun cleaning outfit admitted in evidence as Plaintiff's Exhibit 20, and as it cannot be copied into the record is sent to the Supreme Court as original evidence.)

Q. Mr. Finley, from your examination of the place on the tractor that you testified that you examined here in Selma, Alabama, were you able to ascertain how far that gun was away from that tractor when it was fired in there?

Mr. Esco: If your Honor please, we object to him testifying to anything of that sort unless he can lay a proper predicate and show this man to be duly qualified to testify to that fact.

The Court: Overrule.

Q. Mr. Finley, did you make some test shots to ascertain the distance, how far that would be, to make the hole that was made in that vehicle?

A. Yes.

The Court: Just a moment. Do you want to take him on voir dire?

Mr. Esco: I would like to read into the record that the solicitor is now demonstrating to this witness and before this jury a group of cardboard cards in which there are various holes, showing what I expect is a shotgun pattern, and which he is asking this witness about. We certainly object to the showing of those to the jury or any testimony concerning them. They are not the same material, metal, and there has been no proper predicate laid showing what conditions the tests were made in.

The Court: Objection is overruled.

Mr. Esco: We except, if you please.

Q. Mr. Finley, I will show you a cardboard marked for identification purposes as Plaintiff's Exhibit No. 37, and ask you do you recognize that?

A. Yes.

Q. And what do these holes in here represent?

A. That represents a pattern in which I fired from this Winchester shotgun at a distance of eight feet.

Q. Will you show that to the jury?

Mr. Esco: If your Honor please, we object to it. It is not in evidence and we object. Let the record show he is showing a cardboard pattern with evidence shotgun holes in it to the jury. We object on the grounds that it is not a fair comparison of the thing to be tested against, which is metal, and he is showing carboard here; and he has laid no predicate to show that this is a comparative metal or a comparative pattern that's been made. It is not a fair comparison.

The Court: Overrule.

Mr. Esco: We except.

Q. Is there any distinction in the pattern if it is shot into cardboard or if it is shot into metal?

[fol. 112] Mr. Esco: We object to his answering unless the predicate has been laid showing him to be an expert.

Mr. McLeod: I qualified him.

Q. In your opinion are they similar when they are fired into cardboard or fired into metal?

A. Well, no, I believe in metal is somewhat of a different—

Mr. Esco: (Interrupting) We object. He has answered the question, he said 'no.'

Q. By shooting into cardboard can you, as a criminalist for the State of Alabama, compare these that are shot into cardboard, thereby forming an opinion as to the distance the gun was away from this tractor when it was fired into there?

Mr. Esco: We object to that, may it please the Court.

The Court: Yes, sir, objection sustained.

Q. Can you make a comparison by these tests that you were just testifying to?

A. I can use the test to form an opinion.

Q. And the opinion that you have formed, how far was the shotgun away from the tractor when it was fired into?

Mr. Esco: We're going to object, your Honor, unless the proper predicate is shown to show how he knows what he knows, whether or not he is qualified as an expert, whether or not he under the same conditions has made a test in a speeding automobile against a speeding truck, of the same metal that was involved in the vehicle hit, same shell was used, same brand and type and size was used, and the same age shell as far as that's concerned.

The Court: Overrule.

Mr. Esco: Exception, if you please.

Q. Answer. Do you remember the question?

A. Will you read it, please?

Court Reporter: (Reading from her notes) "And the opinion that you have formed, how far was the shotgun away from the tractor when it was fired into?"

A. It is my opinion that it was a distance not greater than eight feet.

Mr. Esco: We move to exclude the testimony.

The Court: Overrule.

Mr. Esco: We except.

(Court stands in recess for a few minutes and the jury retires to the jury room.)

(Court called to order and trial resumed.)

(Jury returns to the jury box, and Mr. Finley continues on the witness stand.)

Q. Mr. Finley, I will show you Plaintiff's Exhibit No. 8, and ask you do you recognize that?

A. Yes.

Q. What is it?

A. That is a disc made of a plastic type material.

Q. Where did you find that?

A. In the cab, in the tractor.

Q. Now, was that the tractor that was shot into?

A. Yes.

[fol. 113] Q. Did you find it on the inside?

A. Yes, sir.

Q. I will show you—

Mr. Esco: (Interrupting) If your Honor please, we move to exclude the testimony unless it can be shown that this exhibit has been in this man's hands or that it is marked in some way by which he can identify it.

Q. Mr. Finley, did you personally find that wadding?

A. Yes.

Q. And was that on January 18, 1962?

A. Yes.

Q. And from that day until you brought it into this court room has it been in your possession?

A. Yes.

Q. And is that wadding in the same shape as it was when you removed it from that tractor on January 18, 1962?

A. Yes,—

Mr. Esco: (Interrupting) We object unless it is shown it has been in his possession until brought into this court room, today and at this time.

The Court: Overrule.

Mr. Esco: And we except.

Q. Answer.

A. Would you read the question back, please?

Court Reporter: (Reading from her notes) "And is that wadding in the same shape as it was when you removed it from that tractor on January 18, 1962?"

A. It appears to be.

Mr. McLeod: State would like to offer in evidence Plaintiff's Exhibit No. 8, which is a wadding as testified to by Mr. Finley that he removed from the tractor on January 18, 1962.

Mr. Esco: We object unless the predicate be laid to show that it's been in his possession at all times until it was brought into this court room and demonstrated by him today, or unless he can show a marking on the disc itself by which he can identify it.

The Court: Overrule.

Mr. Esco: We except, if you please.

(Above described plastic wadding admitted in evidence as Plaintiff's Exhibit 8, and as it cannot be copied into the record is sent to the Supreme Court as original evidence.)

Q. Now I will show you Plaintiff's Exhibit No. 9 and ask you do you recognize that?

A. Yes.

Q. And what is that, Mr. Finley?

A. That is a piece of wadding removed from a 12 gauge double "O" buckshot magnum shell, which I removed from the 1959 Ford automobile.

Q. Has that been in your possession—this, and the shell—from the time that you removed it from that 1959 Galaxie Ford automobile until you brought it and turned it into this court room?

A. Yes.

Mr. Esco: Your Honor please, we object on the same grounds, unless it can be shown that until brought into this court room that this has been in his possession—until

[fol. 114] brought into this court room today and at this time.

The Court: Overrule.

Mr. Esco: Exception, if you please.

Mr. McLeod: State would like to offer this in evidence.

(Above described wadding admitted in evidence without objection as Plaintiff's Exhibit 9, and as it cannot be copied into the record is sent to the Supreme Court as original evidence.)

Q. Now Mr. Finley, this wadding that you said you removed from double "O" buckshot, during your four and a half years experience as a criminalist for the State of Alabama have you ever seen any wadding of this type except in Peters double "O" magnum load?

Mr. Esco: We object, your Honor, unless it can be shown that he is an expert on shells, that he knows how they are manufactured, that he has examined all shells manufactured, and knows of his own personal knowledge that no other company and no other firm than Peters uses that wadding.

The Court: Overrule.

Mr. Esco: We except, if you please.

The Witness: Will you repeat the question, please?

Court Reporter: (Reading from her notes) "Now, Mr. Finley, this wadding that you said you removed from double "O" buckshot, during your four and a half years experience as a criminalist for the State of Alabama have you ever seen any wadding of this type except in Peters double "O" magnum load?"

A. No.

Q. Do you have available to you at the State Department of Toxicology's laboratory numerous shells that are manufactured in the United States?

A. Yes.

Q. And do you have—in the laboratory do you have shells of all types that you know of as being manufactured in the United States?

A. We have numerous shells but I don't know that we have one of every type.

Q. Is it every type that you know of?

A. Yes.

Q. Now, Mr. Finley, is this the only type of wadding that is used in a gun?

A. No.

Q. What other type is used?

A. Hair type of wadding.

Q. Now, what is the difference in the use of this plastic type wadding and the hair type wadding?

Mr. Esco: If your Honor please, we object unless some predicate is laid to show exactly what his testimony is. He has testified this wadding came out of a shell that was found in this car; and he also testified about it that it was a Peters shell. Now, I ask your Honor to rule out any attempt to go into any type or comparison with other shells.

The Court: Yes, sir, unless he can find other shells found in the car for comparison, sustain your objection.

Q. Were there other shells found in the car?

A. Yes.

[fol. 115] Q. Were shells found in the ammo belt?

A. Yes, sir.

Q. Were there shells found in that Peters box in there?

A. Yes, sir.

Q. And was it a great many of them?

A. Yes, sir.

Q. Now, Mr. Finley, I will show you Plaintiff's Exhibit No. 10, and ask you do you recognize that?

A. Yes.

Q. I will show you Plaintiff's Exhibit No. 11, and ask you do you recognize that?

A. Yes.

Q. And where did you find that ammunition?

A. This, I found double "O" magnum load in this automobile; and this one, double "O" magnum, which I purchased myself.

Mr. Esco: If your Honor please, we have no fault to find that he found the shell in the car, but there is no question of two shots here, no question of a comparison shot. Only one shot was fired, and we object to any comparison

between the two shells. We can't see any reason for that question.

The Court: Overrule.

Mr. Esco: We except, if you please.

Q. Mr. Finley, what is the difference when you use this plastic in a shell, as used in Plaintiff's Exhibit No. 10, with a similar plastic wadding, and Plaintiff's Exhibit No. 9 with a hair type wadding?

Mr. Esco: If your Honor please, we object. It is not a question here as to whether or not it was a hair type or a plastic type. He said he found a plastic type in the truck. Unless it is shown another there was another shot and he does a comparison between the two for demonstrative purposes, we can see no reason and it is prejudicial.

The Court: Overrule.

Mr. Esco: We except, if you please.

A. By the use of the plastic type wadding, that takes up less space than the hair type wadding would, and therefore giving you the possibility of more room within your hull.

Q. How many double "O" buck is in a Peters ammunition where they use the hair type wadding?

Mr. Esco: We object, your Honor. The question here is not a shell that used a hair type wadding.

The Court: Overrule.

Mr. Esco: We except.

Q. How many is in that?

A. Nine.

Q. And now, where the plastic wadding is used, how many pellets is in there—how many double "O" buckshot pellets are in there?

A. Twelve.

Q. So by the use of the plastic wadding how many extra pellets do they get in a double "O" magnum load?

Mr. Esco: We object to that as a leading question.

The Court: Overrule.

[fol. 116] Mr. Esco: We except, if you please.

A. Three.

Mr. McLeod: Your witness.

Mr. Esco: I move that we adjourn, your Honor, and take up cross-examination in the morning.

The Court: Yes, sir, it is supper time. You gentlemen will be provided lodging and food under the direction of a bailiff of the Court, as you were last evening. The instructions and admonitions that the Court has heretofore given you are every bit as applicable or more applicable over night as they have been at all other times. You will not discuss this case among yourselves, and you will not read any newspapers or any periodicals or reports that have anything to do with it or pertain to this case while you are on this jury. You will be under the direction of the bailiff and you will serve as a jury or a group and remain a group during the time that you are in recess. You will permit no one on the outside to discuss this case with you in any way, directly or indirectly, or approach you in any manner or means in connection with this case. You will not watch television or listen to the radio, any newscasts or broadcasts, or anything that pertains to news media while you are on this jury. Whether I have covered all of the news media or not, I don't know, but you gentlemen are up here to try this case upon the evidence presented to you in Court and not from anything you gentleman learn on the outside, and I ask you to preserve that inviolate throughout the course of this trial. Gentlemen, we will resume proceedings at eight-thirty in the morning. Please be back at eight-thirty in the morning.

(Court stands in recess for the night.)

(Court called to order next morning and trial is resumed, with Mr. Finley continuing on the witness stand.)

The Court: Proceed.

Cross examination.

By Mr. Esco:

Q. Mr. Finley, this automobile that you searched and these items that you have testified as having been found therein, came into your possession when?

A. January 19, 1962.

Q. What time of day, please, sir?

A. Approximately ten a.m. I'd say.

Q. And do you know when that automobile was taken out of the hands of this defendant and out of his sight?

A. No. No, sir.

Q. You do not. Who was the vehicle—did you take it out of the defendant's hands?

A. No.

Q. And who had possession of the automobile prior to the time that you received possession of it?

[fol. 117] A. Chief W. R. Jones turned it over to me.

Q. And the automobile was apprehended in a town close to Anniston on the 18th, is that correct?

A. I don't know.

Q. But you received it where?

A. At the Alabama Highway Patrol office in Montgomery.

Q. In Montgomery. Now, when did you first examine that automobile?

A. There.

Q. Montgomery?

A. Yes, sir.

Q. When did you examine it?

A. On January 19, 1962.

Q. Were you the first person who examined it?

A. I don't know.

Q. Now, where did you find the shotguns that are in evidence here?

A. In the back seat of the 1959 Ford.

Q. You have testified as to an expert's opinion as to the distance from which the shot was fired. Now I'll ask you, are you an expert in the field of ballistics?

A. No.

Q. Does ballistics not include the study of gunpowder and the velocity thereto that it produces?

A. Ballistics is the study of the motion of a projectile.

Q. And it does not include the study of gunpowder and the velocity produced thereby?

A. I am not familiar with the study of ballistics since we do not work within that particular field.

Q. So you admit you know nothing about ballistics?

A. Yes, sir.

Q. Are you a gunpowder expert?

A. No.

Q. Do you know of your own personal knowledge and experience that gunpowder in various shells varies according to age—varies in force according to age?

A. I haven't had enough experience to answer that.

Q. Do you know of your own personal knowledge that the velocity with which powder will hurl an object is changed by conditions under which it is stored?

A. I haven't had much experience with powder. I haven't had enough experience with powder to answer that.

Q. Well, sir, now, you testified that you had about all the shells manufactured in the United States, and that you have manipulated them and tested them and worked with them for years and years and years. You haven't observed these things about them?

A. I didn't make a survey of the powder that was in them, no, sir.

Q. Then what you have testified to is just a partial knowledge of the shells that you have testified to, and not a full knowledge of all the factors and things?

A. It is what is known as a firearms comparison.

Q. But the conditions under which your tests were made are not scientific to the point where you can call them correct, are they?

A. I would say they are correct.

Q. Correct as far as your test goes, but your tests just don't go far enough, do they?

A. Well, that's for the Court to decide.

Q. But what I'm getting at, Mr. Finley, and it is not at all personal with you at all, it is simply an admission from you, to the effect that you did a test based upon such presumption, didn't you?

A. I did a test, a comparison test, based upon which evidence was assessed.

[fol. 118] Q. And you didn't have to presume that the shell that you used had not been soaked in water or was not ten years old or was not two years old, or that it had

a perfect cap on it or an imperfect cap? You took none of those things into consideration?

A. No.

Q. You didn't take into consideration anything about the form of the casing, did you? Whether or not the casing was like the casing exactly, and it had been fitted and tamped and tapped exactly like the other shell, did you?

A. We made it a point to use one of the shells that I removed from this '59 Ford automobile for comparison in the test.

Q. But you didn't make any notations or you didn't observe anything about the casing of that shell, did you, to see whether or not it was perfect?

A. No.

Q. Now, this automobile was turned over to you and it contained what has been called a lethal weapon, a weapon that had been used in a shooting. Whose fingerprints did you find on this weapon?

A. I didn't look for fingerprints.

Q. You didn't?

A. No.

Q. Why not?

A. It wasn't requested and therefore I didn't dust the automobile or the weapons inside for fingerprints.

Q. Mr. Finley, isn't it basic scientific police procedure to check for fingerprints first thing?

A. Not in all cases, no.

Q. You mean when a gun has been used in an incident it is not usual police methods to check for fingerprints?

A. It is just according to what the circumstances would be.

Q. You mean that you or any of the men in charge of this investigation were not interested enough in fingerprints on a weapon that had been used for assault with intent to murder to check it for fingerprints?

A. Our department's services are rendered as requested, and in this case if Chief W. R. Jones had requested to dust these articles for fingerprints I would have.

Q. But you didn't.

A. That's right.

Q. Did anybody else?

A. I do not know.

Q. Did you check that tag for fingerprints?

A. No.

Q. Why not?

A. The same thing holds. It wasn't requested, therefore I didn't render the service.

Q. You mean you weren't interested in learning who had handled a lethal weapon, who had handled an extra tag found in the car; or you weren't interested in learning who had been in and about those instruments or who had touched them or used them?

A. Our department renders service—

Q. (Interrupting.) I'm not asking you that, sir. I'd like an answer that the question calls for. It calls for a reasonable answer.

Mr. McLeod: We object to that question, your Honor, because he is asking this man an opinion as to the thought that was in other people's mind.

Mr. Esco: I'm asking about what's in his mind.

Mr. McLeod: We object to what was in Mr. Finley's mind.

Mr. Esco: I'm asking him as a supposed expert in a crime [fol. 119] inal investigation why he did not follow procedure, ordinary procedure that even the layman on the street knows.

Mr. McLeod: Well, have you proven that that is ordinary procedure, Mr. Esco? Are you such an expert that you know these things must be done?

Mr. Esco: As a citizen they are general things we all know.

Mr. McLeod: I don't think you know that, Mr. Esco.

The Court: Just address your question to the witness. I instruct the witness, if you have any interest in this case or the development of the evidence in this case, other than that which you have testified to, answer the question of counsel.

The Witness: No interest other than rendering the service requested by the requesting officers.

Q. Now, did you test the automobile itself for finger-prints?

A. No.

Q. And why did you not do that?

A. The same holds. It wasn't requested by the officer in charge who requested the service.

Q. What other tests did you make, Mr. Finley, other than what you have testified here to?

A. (No answer.)

Q. Let me change my question, and perhaps you can answer it. Did you make any test to connect any person, or in an effort to determine what person did the crime that you were investigating?

A. No.

Mr. Esco: I believe that's all.

Redirect examination.

By Mr. McLeod:

Q. Mr. Finley, all of the evidence that was turned over to you, did you check it thoroughly and capably?

A. Yes.

Mr. McLeod: That's all.

Dr. C. J. REHLING, being duly sworn, testified as follows:

Direct examination.

By Mr. McLeod:

Q. What is your name?

A. C. J. Rehling.

Q. What is your occupation?

A. State toxicologist.

Q. Are you in charge of the State Department of Toxicology?

A. Director of that department, yes.

Q. What is your training for that position, Doctor?

A. I have a master's degree from Auburn in chemistry, doctor's degree from the University of Wisconsin, bachelor of law from Jones' Law School in Montgomery.

[fol. 120] Q. How much experience have you had?

A. Twenty-three years.

Q. Have you handled many cases in that twenty-three years, Doctor?

A. Very many, yes.

Q. Could you give a rough estimate as to the minimum you have handled in that time?

A. Well, I'd say I have worked a great many death cases, something in the way of over a thousand death cases, and I have handled a very great many of a variety of cases, almost anything in the way of scientific examination of evidence in directed line.

Q. Were you also a professor of chemistry at Auburn?

A. I was a member of the faculty for five years, yes.

Q. And were you a lecturer in that school?

A. Yes, I was.

Q. And have you conducted other schools, Doctor?

A. Yes, I have given lectures upon request to police schools in this state and other states in the southeast.

Q. Dr. Rehling, will you explain to this jury the difference between ballistics and fire arms identification?

A. The science of ballistics is one that is primarily confined to the military, in that it is a study of the projectiles in flight or motion, being in the barrel of the gun or on its path from the gun to the target; and it also involves the matter of its behavior upon contact with the target. It is essentially the mathematical and physical science of the path and its behavior as to the projectile it is going to make, the distance it is going to reach and how it is going to contact the target. The science of fire arms identification is an entirely different science that is constituted of the determination of identification of weapons, as to whether or not they fired a particular bullet or fired cartridge; and it depends upon the identification and matching of various microscopic markings that may have been transferred from the weapon to the bullet or to the cartridge.

Q. In order to be a person that can perform a fire arms identification test, do you have to be an expert in ballistics to accomplish that?

A. No. The science of ballistics is rather removed from fire arms identification and is very rarely ever applied or even involved in fire arms identification.

Q. I believe you stated that ballistics is mainly used by the military in artillery and things of that nature?

A. Large projectiles application, yes.

Mr. McLeod: Your witness.

Cross examination.

By Mr. Esco:

Q. Dr. Rehling, you've done a pretty good job of explaining what external ballistics is. What does internal ballistics mean?

A. The motion or movements of the projectile in the firing process.

Q. And does it not include the study of the powder and the shell and the casing, the firing apparatus of the shell, the force down the barrel and how it leaves the barrel?

A. It involves those factors in producing the motion of the projectile.

[fol. 121] Q. Anything that produces the motion.

A. That's right.

Q. And the essential thing that produces the motion is the shell, isn't it?

A. No, it's the explosion that produces the motion.

Q. I see. Well, the explosion is in the shell.

A. Yes, the shell or cartridge, as the case may be.

Q. And the condition of the shell or cartridge, and the age, and things of that sort, all go into the study of ballistics, doesn't it?

A. The age and kind of powder that is involved will determine the power with which the projectile is propelled down the barrel.

Q. Yes, sir. But that's all included in the study of ballistics, isn't it?

A. Yes.

Redirect examination.

By Mr. McLeod:

Q. Dr. Rehling, assuming that a gun has a defect in that gun which makes a marking on a casing, would there be any difference in that marking whether it was fired at night time, day time, or during rainy weather or when not raining, or whether it's warm weather or cold weather, would that marking be different if there is a defect in that rifle?

Mr. Esco: Now we object to that. That's a leading question, not based on any hypothesis, no proper predicate at all.

The Court: Yes, sir, the question is leading. Sustain the objection.

Q. Would you explain to this jury what effect a defect in a gun would have as to the time and the conditions under which it may be fired.

Mr. Esco: Your Honor, please, now we object unless it be shown that he is an expert in that field and properly qualified in that field.

The Court: Overrule.

Mr. Esco: We except, if you please.

A. The firing of a weapon involves the cutting off of the cap and the explosion, by which then the cartridge is pressed against the breech block or breech bolt, as the case may be, and the firing pin and other apparatus making certain markings thereon is involved in that process. Any abnormalities, defects and so on, that may be on the breech face may be impressed upon that shell—just in the same manner that finger prints may be impressed upon a surface by contact. The transfer of that defect or impression to that shell is not dependent on anything except pressure, by means of which the cartridge is pressed back against the breech block or the extractory ejector contacting that in the operation of the mechanism is done. That, of course, is independent of temperature, independent of atmospheric conditions or moisture or atmospheric pressure and the temperature.

Mr. Esco: Now we move to exclude that on the grounds it is not responsive to the question; on the further ground it is rendered by a person incompetent to testify on the subject to which he testified to.

The Court: Overrule.

[fol. 122] Mr. Esco: We except, if you please.

Mr. McLeod: Your witness.

Mr. Esco: I have no questions.

Mr. McLeod: Thank you, Doctor.

STATE RESTS

Mr. McLeod: The State rests.

MOTIONS MADE AND DENIAL THEREOF

Mr. Esco: At this time we make a motion for a mistrial in this case due to the fact illegal prejudicial testimony and evidence has been produced, and an atmosphere of hostility such as not to give the defendant an impartial and fair trial in this case.

The Court: Motion for a mistrial is overruled and denied.

Mr. Esco: We except, if you please. And your Honor there is no evidence here whatsoever to connect this defendant with this incident, with this crime. Not one iota of testimony has connected this defendant up with this crime. At this time we make a motion to exclude the evidence and discharge the defendant on the grounds that it is prejudicial, no proper predicate has been laid for the various exhibits here, that there were illegal conclusions and opinions given by people who were incompetent to testify, that hearsay evidence has been included in the testimony, there has been the introduction of an illegal confession; that the evidence is immaterial, irrelevant and illegal; that we have opinion evidence given in this case by persons not proven to be experts in the field in which they gave their opinion, that the evidence itself is incompetent and given by incompetent and unqualified witnesses.

The Court: Motion to exclude is overruled and denied. Motion to exclude the evidence is overruled and denied.

Mr. Esco: To which we do duly, legally and properly except.

Mr. Esco: We have no witnesses.

The Court: The defendant rests?

DEFENDANT RESTS

Mr. Esco: Yes, sir. The defendant rests.

The Court: You gentlemen may go to the jury.

(Mr. McLeod sums up to the jury.)

(Mr. Esco sums up to the jury, and during his summation the following occurred:)

Mr. Esco: —a man locked up in that hot box and prom-[fol. 123] ised things if he would sign—

Mr. McLeod: (Interrupting) There is no evidence of that. I want him to confine his talk to what came from that stand.

The Court: Proceed.

(Mr. Esco continues his summation to the jury.)

(Mr. McLeod sums up to the jury.)

The Court: Let the record show that the requested charges of the defendant were submitted to the Court after the opening argument of the solicitor and after concluding the argument by counsel for the defendant.

The Court: Gentlemen, we are going to stand in recess for a few minutes. You may retire to the jury room if you see fit.

(Jury retires to the jury room, and court stands in recess for a few minutes.)

(Jury returns to the court room and trial continues.)

The Court: Court will come to order.

THE COURT'S CHARGE TO THE JURY:

Gentlemen of the jury, the defendant in this case is on trial under an indictment returned by the grand jury of Dallas County, Alabama, which indictment reads as follows: (Reading) "The State of Alabama, Dallas County. Circuit Court of Dallas County, January Term, 1962. The grand jury of said county charge that before the finding of this indictment Jesse Elliott Douglas, whose name is unknown to the grand jury other than as stated, unlawfully and with malice aforethought, did assault Charles Warren with the intent to murder him, against the peace and dignity of the State of Alabama." Signed: "Blanchard L. McLeod, Solicitor Fourth Judicial Circuit."

Now, gentlemen, this indictment is anchored to Section 38 of Title 14 of the Code of Alabama 1940, which reads as follows: (Reading) "Any person who commits an assault on another, with intent to murder, maim, rob, ravish, or commit the crime against nature, or who attempts to poison any human being, or to commit murder by any means not amounting to an assault, shall, on conviction, be punished by imprisonment in the penitentiary for not less than two nor more than twenty years."

Gentlemen, the indictment in this case is not evidence. It is not evidence of the innocence or guilt of this defendant. It is merely the method or manner by which this defendant is brought to trial, and when it has served that purpose then its function in this case is complete. So you will not consider the indictment as evidence in this case in arriving at your verdict. The fact that this defendant has been indicted in this case is not evidence of his innocence or guilt, nor is the fact that this indictment was returned into this Court by a grand jury of this county evidence in this case, and you will not consider it as such in arriving at your verdict.

[fol. 124] The evidence in this case has been presented to you here in open Court, and you will look to that evidence and that evidence alone in your determination of the issue of the guilt or innocence of the defendant.

The defendant has entered a plea of not guilty. He says by that plea that he is not guilty of any offense embraced

within the indictment. So, by the indictment on the one hand and the defendant's plea of not guilty on the other, we have what is known as a joining of issue, which puts it squarely up to you as a jury to determine the issue of the innocence or guilt of the defendant of the offenses embraced within the indictment.

I have said that the indictment charges the defendant with the offense of assault with intent to murder. There is embraced within this indictment three separate offenses known to the law of Alabama. That is to say, there is embraced within this indictment the offense of assault with intent to murder, the offense of assault and battery, and the offense of assault. In that connection I will read to you Section 323 of Title 15 of the Code of Alabama 1940, which has application to this case and reads as follows: (Reading) Section 323, Title 15, "Verdict may be for less offense than charged. When the indictment charges an offense of which there are different degrees, the jury may find the defendant not guilty of the degree charged, and guilty of any degree inferior thereto, or of an attempt to commit the offense charged; and the defendant may also be found guilty of any offense which is necessarily included in that with which he is charged, whether it be a felony or a misdemeanor."

Now in that connection, gentlemen of the jury, I charge you that the offenses of assault and assault and battery are necessarily included in the offense of assault with intent to murder—the three offenses of assault with intent to murder, assault and battery, and assault. It therefore becomes necessary that the Court define to you those three offenses. What is assault with intent to murder? An assault with intent to murder is an assault committed unlawfully, willfully and maliciously, and with the intent to take the life of the party assaulted. Now, unlawful means without legal excuse or justification; willful means that the defendant must have been governed by his will; as contradistinguished from a sudden or rash act; and malice is a mental state or condition of one's mind which prompts him to do an unlawful act without legal excuse, justification or extenuation. Now, while malice is a quality or condition of a man's mind, and it is not given to man to be able

to read another man's mind, yet malice is capable of proof; and in order for you to determine whether or not malice did exist in this case, you may look to all of the facts and circumstances presented by the evidence in this case. Malice signifies a formed design on the part of the defendant to take the life of the person assaulted unlawfully, not in self-defense, and without such provocation as the law says would repel the imputation of malice. Now, malice may be presumed from the use of a deadly weapon, unless the evidence which proves the use of such deadly weapon, if such is proven, rebuts such presumption. Where the facts which prove the use of a deadly weapon in the commission of an assault on another do not tend to rebut the presumption of malice which the law raises from the use of a deadly [fol. 125] weapon, it becomes incumbent on the defendant to rebut that presumption by other evidence in the case, and failing to meet this burden, the jury may presume malice from the use of such deadly weapon.

If malice does not exist then the offense would not be assault with intent to murder. The offense may be reduced from assault with intent to murder to assault and battery or assault by sufficient provocation. To reduce the offense from assault with intent to murder to assault and battery or assault there must be sudden passion caused by adequate provocation; but mere passion not suddenly aroused by a sudden affray, in which the accused was not the aggressor, will not so reduce it. Mere words, however approbrious, will not so reduce it. The provocation which will reduce the offense from assault with intent to murder to assault and battery or assault must at least amount to personal violence or be accompanied by acts evincing an intention to resort to immediate force, and the act of the defendant must have been the unpremeditated result of the passion thus aroused. In other words, the act must have been wholly the result of sudden passion aroused by sudden sufficient provocation.

An intent to murder is an essential element of the offense of assault with intent to murder. Intent is the purpose to use a particular means to effect the result and accomplish the purpose. An intent to kill may be inferred by the jury as a fact from an act of violence from which in the usual

and ordinary course of things death or great bodily harm may result, for every sane man is presumed to intend the natural and probable consequences of his act, unless the contrary is shown. Such intent may be inferred by the jury as a fact from the unlawful use of a deadly weapon, provided it was used in such a manner as to indicate an intention to kill, for it is not necessary to prove the intent by direct and positive evidence. To enable you to determine the intent with which the act was done, if it was done, you may look to the proof in regard to the weapon and the manner and extent of its use. Thus, if one in an assault should use a weapon capable of inflicting a mortal wound, and with it wound his antagonist in such a way that in the ordinary and usual course of things death or great bodily harm would result, the intent to kill might be inferred from the use of such weapon. On the other hand, if the assault was committed with such means or instrument that in the ordinary and usual course of things death or great bodily harm would not likely result, the inference of the intent might well be different. The intent of the accused is a question of fact to be determined by the jury upon a consideration of all the evidence in the case.

I will now define to you the offense of assault, and assault and battery, which are included within this indictment. And in that connection, gentlemen, I will read to you Section 33 of Title 14 of the Code of Alabama 1940, which reads as follows, (Reading) "Any person who commits an assault, or an assault and battery, on another shall, on conviction, be fined not more than \$500.00, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months." Now, an assault is defined as an attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice [fol. 126] or wantonness, under such circumstances as denote at the time an intention to do it, coupled with present ability to carry such intention into effect. There must be a present ability to carry the unlawful attempt and intention into effect. The word attempt is defined as an intent to do a thing, coupled with an overt act in that direction, an endeavor to do it, which falls short of the accomplishment of the thing intended. The attempt which is a neces-

sary ingredient of a criminal assault implies more than a mere intention formed. Some step towards consummation must be taken before an intention becomes an attempt. A battery, or assault and battery, as it is sometimes called, is an unlawful touching of the person of another by the aggressor himself or by any other substance put in motion by him. Every battery includes an assault. Any touching by one person of the person of another in rudeness or in anger is an assault and battery, and every assault and battery includes an assault.

Now, I have said that the indictment in this case embraces these offenses, and charges this defendant with the commission thereof, of assault with intent to murder, assault and battery, and assault. The State by the indictment says that the defendant is guilty as charged in the indictment. The defendant by his plea says that he is not guilty of assault with intent to murder, that he is not guilty of assault and battery, and that he is not guilty of assault. That casts upon this jury the duty of determining the issue of the innocence or guilt of this defendant of the offenses charged in the indictment.

Now, gentlemen, in this case the State does not necessarily contend that the defendant was the actual perpetrator of the offense charged, but the State does contend that he aided or abetted the actual perpetrator of the offense in its commission. By stating that contention on the part of the State, the Court is not saying that it is true or false. I merely state it to show to you the issues involved. It is for you as a jury, as the sole judges of the evidence, to say whether it is true or false. Now, in that connection the Court will read to you Section 44 of Title 14 of the Code of Alabama, which reads as follows: (Reading) "Accessories before the fact; principals in first and second degrees; distinction abolished. . . . The distinction between an accessory before the fact and a principal, between principals in the first and second degree, in cases of felony, is abolished; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid or abet in its commission, though not present, must hereafter be indicted, tried and punished as principals, as in the case of misdemeanors."

Now, gentlemen, in that connection the Court charges you: when by prearrangement or on the spur of the moment, two or more persons enter upon a common enterprise or adventure and a criminal offense is contemplated, then each is a conspirator, and if the purpose is carried out, each is guilty of the offense committed, whether he did any overt act or not. This rests on the principle that one who is present, aiding, abetting, encouraging or assisting the active perpetrator in the commission of the offense is a guilty participant, and in the eyes of the law is equally guilty with the one who does the act. Such community of purpose may be proved by circumstantial evidence. To aid and abet comprehends all assistance rendered by acts or [fol. 127] words of encouragement, or support or presence, actual or constructive, to render assistance should it become necessary. No particular acts are necessary. If encouragement be given to commit the felony, or if, giving due weight to all of the testimony, the jury is convinced beyond a reasonable doubt that the defendant was present with a view to render aid should it become necessary, then that ingredient of the offense is made out. Now if there is no prearrangement or preconcert, mere presence, with the intent to give aid if necessary, is not aiding or abetting unless the principal knew of the presence with intent to aid, of such person. So, if being present without preconcert, two or more persons entered into a common illegal purpose, and one or more of them did the act of violence and the others were present, aiding, abetting, encouraging, or giving countenance to the unlawful act, or ready with the perpetrator's knowledge of their intent to render assistance to him if necessary, to lend assistance if it should become necessary, the other or others are as guilty as the actor or actors. To establish a conspiracy, it is not always necessary to show prearrangement to do the particular wrongful act committed. But it is true that when two or more persons enter upon an unlawful purpose with a common intent to aid or encourage each other in carrying out their common design, they are each responsible for everything which may subsequently and proximately result from such unlawful purpose, whether specially contemplated or not.

Now, gentlemen, under the laws of the State of Alabama, the burden of proof in this case rests upon the State. Under the law, the State of Alabama is required to convince you from the evidence introduced beyond all reasonable doubt that the defendant is guilty as charged in the indictment which I have read to you. As I say, the measure of the burden of proof imposed on the State of Alabama is that the State must convince you by the evidence in this case beyond all reasonable doubt that this defendant is guilty as charged in the indictment. Now, the defendant comes into this case and enters upon the trial clothed with the presumption of innocence. That presumption of innocence is a matter of evidence, and it goes with and abides with this defendant throughout the course of this trial, unless the evidence in the case convinces you beyond all reasonable doubt that the defendant is guilty as charged in the indictment; and if the evidence fails to so convince you, then the presumption of innocence has not been rebutted or overcome, and in that event you could not convict the defendant. In other words, the presumption of innocence is a cloak that is thrown around this defendant for his protection, and it is a matter of evidence, and it goes with him and abides with him throughout the course of this trial; but it is a rebuttable presumption, and it may be overcome. And the measure of proof required to overcome that presumption of innocence is that the evidence convinces you beyond all reasonable doubt that the defendant is guilty as charged in the indictment which I have read to you.

You gentlemen are the sole judges of the evidence in this case. You are the sole triers of the facts. It is your job and yours alone to determine what the truth in this case is. It is your job to search out the truth and to determine what the true state of affairs is. That is not the Court's responsibility.

[fol. 128] In your efforts to determine the issues in this case, to determine the truth, the true state of affairs, and to arrive at a just and honest verdict, the law says you are authorized and empowered to bring into the jury box and to employ your common sense.

You are not only the sole judges of the testimony in this case, but you are also the judges of the credibility of the

witnesses who have taken the stand and appeared before you in person. You are the judge of the weight that you will give to the testimony of any witness. And the law says in your efforts to determine what credibility or what weight that you will give to the testimony of any witness, or to all of the witnesses, that you may look to the demeanor of a witness upon the stand, to his or her method or manner of testifying, the reasonableness of his or her testimony, in order to determine what weight or what credibility you will give to the testimony of that witness. The law says that you may look to any interest, any bias, any prejudice, any ill will, any ulterior motive, anything that has been exhibited by a witness in this case that would cause that witness, or might cause that witness, to turn aside from the truth, in order to determine what weight or what credibility you will give to the testimony of that witness. The law also says that you may look to a lack of interest, to a lack of bias, to a lack of prejudice, in your efforts to determine what weight or what credibility you will give to the testimony of that witness. You are the sole judges of the credibility of the witnesses and the weight of their testimony; and in your efforts to determine what weight or what credibility you will give to the testimony of these witnesses, you will apply the same rules to all of the witnesses: to the witnesses for the State of Alabama and to the witnesses for the defendant.

The law says that you are to reconcile the testimony in this case if you can, if you find the same to be in conflict; but if after consideration you find you cannot reconcile all of the testimony in this case, then it is for you to say what testimony you believe and what testimony you do not believe.

Now, gentlemen, the Court has used the term a reasonable doubt. At this time the Court will attempt to define for you what is meant by a reasonable doubt. A reasonable doubt, as that term has been employed by the Court, is not the same thing as a speculative doubt or an imaginary doubt. All things may be open to some speculative doubt or imaginary doubt. That is not the definition of a reasonable doubt. A reasonable doubt, as used in the measure of the burden of proof imposed upon the State of Alabama in this

case, is an actual doubt, a substantial doubt arising out of the evidence in this case, or it may arise from any part of the evidence in the case; or it may arise from a lack of evidence in the case. That, gentlemen, is the definition of what is meant by a reasonable doubt.

Now, gentlemen, as a convenience to you and nothing more, the Court has prepared the various forms of verdict applicable to the offenses embraced within this indictment. You may use those forms of verdict if you see fit, or you can write your own.

Now, if, after a consideration of all of the evidence in this case, you are convinced beyond all reasonable doubt that the defendant is guilty of the offense of assault with intent to murder as charged in the indictment, it will be your duty to convict the defendant of that offense, and in [fol. 129] that event the form of your verdict would be: We, the Jury, find the defendant guilty of assault with intent to murder, as charged in the indictment.

However, if, after a consideration of all of the evidence in the case, you are not convinced beyond all reasonable doubt that the defendant is guilty of the offense of assault with intent to murder, but you are convinced beyond all reasonable doubt that the defendant is guilty of the offense of assault and battery, then in that event the form of your verdict—it would be your duty to convict the defendant, and in that event the form of your verdict would be: We, the Jury, find the defendant guilty of assault and battery, as charged in the indictment, and as punishment for said offense assess a fine against him of blank dollars—there placing such sum as you see fit, but not in excess of \$500.00.

Now, if, after consideration of all of the evidence in this case, you are not convinced beyond all reasonable doubt that the defendant is guilty of the offense of assault with intent to murder, and you are not convinced beyond all reasonable doubt that he is guilty of the offense of assault and battery, as charged in the indictment, but you are convinced beyond all reasonable doubt that he is guilty of the offense of assault, then in that event it would be your duty to convict the defendant of assault, and in that event the form of your verdict would be: We, the Jury, find the defendant guilty of assault, as charged in the indictment, and

as punishment for said offense assess a fine against him of blank dollars—there assessing such fine as you see fit, anything from one cent to \$500.00.

Now, gentlemen, if, after consideration of all of the evidence in this case, you are not convinced beyond all reasonable doubt that the defendant is guilty of the offense of assault with intent to murder, that you are not convinced beyond all reasonable doubt that he is guilty of the offense of assault and battery, that you are not convinced beyond all reasonable doubt that he is guilty of the offense of assault, then it would be your duty to give the defendant the benefit of that doubt, and in that event the form of your verdict would be: We, the Jury, find the defendant not guilty.

Now, whatever verdict you gentlemen arrive at must be a unanimous verdict. All twelve of you gentlemen must concur in a finding of guilty of any of the offenses outlined to you by the Court, and all twelve of you gentlemen must concur in a finding of not guilty. Whatever verdict you gentlemen reach ~~must~~ be a unanimous verdict, and the failure on the part of any one of you to concur in a finding amounts to what is known as a hung jury or a mistrial, whereupon the case stands anew upon the docket for trial as though it had never been submitted to a jury. Now, whatever verdict you gentlemen reach, you will designate one of your number as your foreman to sign that verdict for and on your behalf.

The Court: Are there any exceptions to the Court's oral charge?

Mr. Esco: No exceptions.

Now, gentlemen, in addition to the Court's oral charge, the Court at this time will read to you certain statements of the law, which the Court charges you are correct statements of the law submitted for and on behalf of the defendant; and which the Court charges you that you will consider in connection and conjunction with the Court's oral [fol. 130] charge, and not separate and apart therefrom. (Reading given written charges requested by the defendant:)

I charge you that where an assault committed by means calculated to produce death, but death does not issue, the

State must prove the defendant's criminal intent beyond a reasonable doubt, in order for the act to constitute a felony.

I charge you to authorize a conviction for assault with intent to murder, evidence ~~must~~ show an assault with an intent to take life.

The Court charges the jury that expert testimony is not necessarily binding on the jury.

The Court charges the jury that testimony given by an expert witness as his opinion is not the controlling effect, and the jury is not absolutely required to accept opinions of experts in the place of its own judgment.

The Court charges the jury that the fact the grand jury has returned an indictment against the defendant ~~cannot~~ be judged by the jury as evidence of defendant's guilt.

The Court charges the jury that the presumption of innocence is a shield and a protection to the defendant which attends him throughout the trial, and until the jury is convinced beyond ~~all~~ reasonable doubt by the evidence in the case that the defendant is guilty.

I charge you if there is a reasonable doubt as to whether the shooting was done with malice; the defendant cannot be convicted of assault with intent to murder.

Gentlemen of the jury, I charge you that the question of the defendant's guilt or innocence of the charge of assault with intent to murder, or, is guilty of the lesser charge of assault is solely for you to decide.

I charge you that the jury are the sole and exclusive judges of the evidence in this case, and should determine the issues of this case in the light of the evidence submitted and under the law as given you by the Court.

I charge you a single reasonable doubt of the defendant's guilt arising out of the evidence in this case, after considering all the evidence, is sufficient for the acquittal of the defendant, and it is for the jury to say under all the evidence whether they entertain such doubt.

The Court charges the jury that the indictment in this case is not to be considered by the jury as evidence creating an inference of the defendant's guilt of any offense contained in the indictment.

I charge you that if you believe from the evidence in this case that there are any influences outside of the representatives of the State of Alabama seeking to bring about a

conviction of the defendant, from any motive other than the desire of the just enforcement of law, which influence has operated upon the evidence in this case, you are authorized to take this fact into consideration in determining whether or not the evidence offered by the State is trustworthy and entitled to be believed.

I charge you, gentlemen of the jury, that you are not authorized to infer malice from the character of the weapon used, without regard to other circumstances.

[fol. 131] I charge you, gentlemen of the jury, that a reasonable doubt is that state of the case which after the entire comparison of all the evidence, leaves the minds of the jury in that condition that they cannot say that they have an abiding conviction to a moral certainty of the truth of the charge.

I charge you, gentlemen of the jury, the opinions of the experts are not controlling, and it is for the jury to determine the weight and sufficiency of such testimony.

The Court charges the jury that a reasonable doubt may spring from the lack or the absence of evidence, or may spring from the evidence itself, and that if any reasonable doubt as to the defendant's guilt arising out of the lack of the evidence, or the evidence itself, exists in the minds of the jury, or any single member of the jury, the jury should not return a verdict convicting the defendant.

The Court charges the jury that while it is the duty of each member of the jury to confer with and consider with each and every other member of the jury the facts and circumstances in this case, there is no duty on the part of any member of the jury to sacrifice his own conviction in order to agree with other members of the jury as to the verdict which shall be rendered.

The Court charges the jury that the defendant, by his plea of not guilty, has denied each and every material allegation of fact set out in the indictment and has thereby cast the burden of proof upon the State, requiring the State to produce evidence believed by the jury to be true, sufficient to convince the jury beyond all reasonable doubt that the defendant is guilty as charged in the indictment.

The Court charges the jury that the testimony in this case is to a large degree circumstantial, and that the jury would

not be authorized to convict the defendant upon circumstantial evidence until such evidence believed by the jury to be true is so strong, clear and convincing as to exclude every reasonable hypothesis consistent with the innocence of the defendant.

I charge you, gentlemen of the jury, the opinion testimony of an expert witness is not of controlling effect, and a jury is not required to accept the opinion of experts in the place of its own judgment.

I charge you, gentlemen of the jury, the weight given to the testimony of an expert is solely within the province of the jury.

I charge you, gentlemen of the jury, you may treat an expert's testimony as you, the jury, see fit in connection with the facts and circumstances of this case.

The Court charges the jury that you are not bound by the opinion of experts.

I charge you that no defendant can be convicted of any crime from any inference, except such inference arises out of the testimony offered in the case.

I charge you that the law does not authorize you to convict the defendant merely because you think he is guilty of crime. You must believe beyond a reasonable doubt and to a moral certainty that he did commit the act with which he is charged.

The Court charges the jury that the law places the burden [fol. 132] upon the State to convince the jury beyond all reasonable doubt that the defendant is guilty, and if the evidence introduced fails to convince each individual member of the jury beyond all reasonable doubt that the defendant is guilty, the jury would not be authorized to return a verdict against the defendant convicting him of any offense.

The Court charges the jury that the fact that there is an indictment in this case is not to be considered by the jury as evidence adverse to the defendant.

The Court charges the jury that if the jury believe that any witness has testified falsely as to any material fact, the jury is authorized in the exercise of its discretion to reject the whole, or any part, of the testimony of that witness.

The Court charges the jury that unless the jury is convinced by the evidence beyond a reasonable doubt and to a moral certainty of the defendant's guilt, they should not convict the defendant.

I charge you to authorize a conviction for assault with intent to murder, evidence must show an assault with an intent to take life.

The Court charges the jury that each and every member of the jury must be convinced by the evidence and beyond all reasonable doubt that the defendant is guilty before the jury would be authorized to convict the defendant of any charge in the indictment.

I charge you, gentlemen of the jury, that the defendant is presumed to be innocent until the State by the evidence in this case convinces you beyond all reasonable doubt that he is guilty.

I charge you that there is no duty resting on the defendant to disprove his guilt nor to offer evidence to disprove his guilt, the burden rests upon the State to offer to the jury satisfactory and convincing evidence sufficient to establish the guilt of the defendant in every material element, beyond all reasonable doubt.

The Court charges the jury that the humane provision of the law is that every one charged with crime is presumed to be innocent, and this is a fact in the case which must be considered with all the evidence, and should not be disregarded. This presumption goes with the defendant as a shield for his protection throughout the entire trial until the State removed it by offering evidence of such character as to establish his guilt to a moral certainty.

The Court charges you, gentlemen of the jury, that the law enjoins upon you the imperative duty of giving the defendant the benefit of every reasonable doubt arising from the evidence before you should convict him of any offense embraced in the indictment.

The Court charges the jury that a person charged with a felony should not be convicted of a felony unless the offense excludes to a moral certainty every reasonable conclusion but that of guilt; no matter how strong the circumstances are they do not come up to the full measure of proof which the law requires, if they can be reasonably

reconciled with the theory that the defendant is innocent.

The Court charges the jury that the only foundation for a verdict of guilty in this case is that the jury shall believe from the evidence and beyond a reasonable doubt and to [fol. 133] a moral certainty, that the defendant is guilty as charged in the indictment to the exclusion of every hypothesis consistent with his innocence and every reasonable doubt of his guilt, and if the prosecution has failed to furnish such measure of proof and to so convince the minds of the jury of his guilt, you should find him not guilty.

The burden is upon the State, and it is the duty of the State, to prove by the evidence beyond all reasonable doubt and to the exclusion of every other reasonable hypothesis, every circumstance necessary to show that the defendant is guilty; and unless the state has done that in this case, it is your duty, gentlemen of the jury, to render a verdict of not guilty.

I charge you, gentlemen of the jury, you may treat testimony of experts as it deems best in connection with facts and circumstances of the case, and the judgments of experts or inferences of skilled witnesses, even when unanimous and uncontroverted, are not necessarily conclusive on the jury.

I charge you, gentlemen of the jury, that the defendant is presumed to be innocent of all of the charges embraced in the indictment, and the burden is on the State to prove him guilty by the evidence believed by you to be true, and beyond all reasonable doubt, and after you have considered the entire evidence in this case, if there be a reasonable doubt of the guilt of the defendant arising out of that evidence, or the lack of evidence, then it would be your duty to acquit him.

The Court charges the jury that presumption of innocence attends this defendant through the trial and stays with him until the State brings evidence believed by the jury to be true, so strong and convincing that the jury is convinced beyond all reasonable doubt by such evidence that the defendant is guilty.

I charge you that if the means chosen for an assault are not adapted to the end, it furnishes a strong but not conclusive inference there was no intent to kill.

The Court charges the jury that if any individual member of the jury is not convinced of the guilt of the defendant beyond a reasonable doubt and to a moral certainty, the jury should not convict the defendant.

I charge you, gentlemen of the jury, that you are not bound by the opinion of experts or by the apparent weight of evidence, but you may give your own conclusions.

The Court further charges the jury that they must give the accused the full benefit of all reasonable doubts, arising from any part of the evidence, taken in connection with the whole evidence.

I charge you, gentlemen of the jury, that you would not be authorized to convict the defendant on mere suspicion, surmise or conjecture.

I charge you, gentlemen of the jury, that the indictment in this case has no weight as evidence and should be given no consideration by the jury except that it is an accusation made by the grand jury against the defendant, charging him with the offense embraced in the indictment and is a means provided by law whereby a man accused of offenses against the criminal law may be brought to trial; and the defendant, if indicted by the grand jury, is presumed to [fol. 134] be innocent of such offense embraced in the indictment found by the grand jury until every reasonable doubt of his guilt is removed from the mind of the jury by the evidence admitted in the case.

I charge you, gentlemen of the jury, an accomplice is one who participates in the commission of an offense against the criminal law, or who aids or assists another or others in the commission of such offense, or one who stands by and aids another in the commission of an offense against the criminal law by prearrangement with the person actually committing such offense, or through words or conduct encourages another in the commission of an offense against the criminal law; and no person accused of any felony can be convicted on the testimony of such an accomplice, unless his testimony is corroborated by other evidence tending to connect the defendant with the commission of the offense; and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, is not sufficient.

I charge you suspicion, conjecture and guesswork are not the proper methods of arriving at the guilt or innocence of the defendant on a criminal charge. The only method which the law recognizes as being sufficient to bring about the conviction of a defendant is the production by the State of such clear, satisfactory and convincing evidence that the jury necessarily concludes from such evidence beyond all reasonable doubt, that the defendant is guilty as charged. No duty of any kind rests upon a jury to convict any defendant, unless the evidence offered meets the qualifications of convincing the jury beyond a reasonable doubt.

(End of the Court's charge, including the given written charges.)

The Court: All right, you gentlemen may retire and begin your deliberations. All of the exhibits introduced in this case will be supplied to you.

(The jury retires to the jury room, and in just a few minutes the jury returns to the jury box.)

The Court: Let the record show that the defendant and his counsel and the solicitor are all in Court.

The Court: Now, gentlemen of the jury, it is about lunch time and I assume that you gentlemen would like to have something at the regular hour. You gentlemen will be permitted to go to lunch at such time as you designate. Now, everything that the Court has heretofore instructed you and admonished you has even more application to you gentlemen now, in that this case has been submitted to you. It is now within your hands. In your recesses everything that I have said to you heretofore about your conduct as a jury, and about permitting anyone to discuss this case with you, has even more application than it did when I first said it to you. Now, gentlemen, you will not discuss this case amongst yourselves while you are out as a jury, and you certainly will permit no one on the outside to contact you directly, indirectly, or by any manner or means, in connection with this case. When you gentlemen have had [fol. 135] your lunch you will come back to the jury room and resume your deliberations. The bailiff will see that the jury room is locked when you leave, and that it is also under the same lock when you come back. The exhibits

will remain in the jury room while you gentlemen are out at lunch. You will maintain yourselves as a jury—that is, as a group of twelve men—and you will not become separated or somebody be straggling off at any time. All right, gentlemen, you may return to the jury room, and you are at liberty to go to lunch at any time that you see fit.

(Jury retires to the jury room.)

(Later: —The jury returns to the jury box.)

(The defendant and his counsel and the solicitor are all in Court.)

The Court: Have you gentlemen arrived at a verdict?

Foreman of the Jury: We have, your Honor.

The Court: Will you read it, please?

VERDICT

Foreman of the Jury (Reading): "We, the jury, find the defendant guilty of assault with the intent to murder as charged in the indictment. Albert S. Champion, Foreman".

The Court: Is that signed by you?

Foreman of the Jury: It is.

The Court: You may hand it to me.

(The foreman of the jury hands the verdict to the Court.)

The Court: The Court will proceed to poll the jury. Is that your verdict?

A Juryman: Yes.

(The Court asks the same question, "Is that your verdict?" to each individual member of the jury, and each and every juryman answers, "Yes".)

The Court: All right, gentlemen, your verdict is in order.

[fol. 136] Court Reporter's Certificates to foregoing transcript (omitted in printing).

The undersigned, who is a full time court reporter of the Fourth Judicial Circuit of Alabama and who was accepted by the Court to report the testimony in the trial of:

The State of Alabama, Plaintiff, versus Jesse Elliott Douglas, Defendant, and who has certified to a transcript of the testimony, hereby certifies that the attached exhibits marked, respectively, Plaintiff's Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, and Defendant's Exhibit A, and identified by my signature, cannot conveniently be copied into the transcript and are therefore hereby identified so that they may be forwarded to the Supreme Court.

Gertrude M. Bailey, Official Court Reporter.

[fol. 137] The foregoing is approved and allowed as a correct transcription and statement of the proceedings on the trial of said cause, not otherwise shown by the record; and the said Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, and A, are certified and sent to the Supreme Court as original evidence for its inspection.

James A. Hare, Trial Judge.

The foregoing transcript of the evidence and proceedings in the trial of the cause of The State of Alabama, Plaintiff, versus Jesse Elliott Douglas, Defendant, as transcribed by Gertrude M. Bailey, court reporter, is approved and allowed by me as correct.

This 14th. day of June, 1962.

James A. Hare, Trial Judge.

STATE OF ALABAMA, Plaintiff,

versus

JESSE ELLIOTT DOUGLAS, Defendant.

The undersigned, Gertrude M. Bailey, as official court reporter of the Fourth Judicial Circuit of Alabama, does hereby certify that the attorneys of record for both the

plaintiff and the defendant in the above styled case, said attorneys being as follows, to-wit:

Hon. Blanchard L. McLeod, Camden, Alabama

Hon. Henry F. Reese, Selma, Alabama

Hon. Sam Earl Esco, Jr., Selma, Alabama

were on this the 8th. day of June, 1962, served by me with the following notice, to-wit:

You are hereby notified that the undersigned, as official court reporter for the Fourth Judicial Circuit of Alabama, has this day filed with the Clerk of the Circuit Court of Dallas County, Alabama, a certified transcript of the evidence and exhibits identified by my signature which could not conveniently be copied into the transcript in the above styled case.

I give you further notice that you will have ten days from the date hereof to file objections to said certified transcript.

Gertrude M. Bailey, Official Court Reporter, Fourth Judicial Circuit of Alabama.

[fol. 138]

IN THE CIRCUIT COURT OF DALLAS COUNTY

STATE OF ALABAMA

APPEAL BOND—March 15, 1962

The State of Alabama,)
Dallas County)

Know All Men by These Presents, That we Jesse Elliott Douglas principal, and J. Wyche Davis & Frank Marsh as sureties, are held and firmly bound unto the State of Alabama in the sum of Seven Thousand Five Hundred and no/100 (\$7,500.00) Dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents; and we and each of us waive our rights of exemption under the Constitution and laws of the State of Alabama, as against this bond.

The Condition of the Above Obligation Is Such, That whereas, the above bounden Jesse Elliott Douglas was on the 3rd. day of March, 1962 convicted in the Circuit Court of Dallas County, Alabama, for the offense of Assault With Intent to Murder and on the 3rd. day of March, 1962 was sentenced to a term of Twenty Years in the penitentiary, from which sentence the said Jesse Elliott Douglas has this day prayed and obtained an Appeal to the Court of Appeals of Alabama.

Now, If the Said Jesse Elliott Douglas shall appear and abide such judgment as may be rendered by the Court of Appeals, and if the judgment of conviction is affirmed, or the Appeal is dismissed, the said Jesse Elliott Douglas shall surrender himself to the Sheriff of Dallas County, at the County Jail within fifteen days from the date of such affirmation or dismissal, then this obligation to be null and void, otherwise to remain in full force and effect.

Given under our hands and seals, this the 15th. day of March 1962.

J. E. Douglas (L.S.), J. Wyche Davis (L.S.), Frank Marsh (L.S.), By W. W. Gamel, Atty. In Fact (L.S.)

Approved:

M. H. Houston, Clerk of the Circuit Court of Dallas County.

[fol. 139]

IN THE CIRCUIT COURT OF DALLAS COUNTY

STATE OF ALABAMA

CERTIFICATE OF APPEAL—April 2, 1962

I, Marguerite H. Houston, Clerk of the Circuit Court of Dallas County, Alabama, hereby certify that in the case of The State of Alabama versus Jesse Elliott Douglas, under indictment in this Court for the offense of Assault with Intent to Murder, which was determined in this Court on the 3rd day of March, 1962, the Defendant, Jesse Elliott Douglas, was convicted of Assault with Intent to Murder.

The Defendant, Jesse Elliott Douglas, was sentenced to imprisonment in the Penitentiary of Alabama for a period of twenty years.

I do further certify that the Defendant applied for and obtained an appeal to the Court of Appeals of Alabama, and by order of the Circuit Court of Dallas County, Alabama, said sentence was suspended pending the determination of such appeal.

Appeal Bond for the Defendant was fixed at Fifty Thousand Dollars by the Court.

On the 15th day of March, 1962, the Court of Appeals of Alabama did enter an order as follows: "The petition for reduction of the amount of bail in this case is hereby granted, and the amount of bail is hereby reduced to the sum of Seventy-five Hundred Dollars (\$7500.00). Upon the execution of said bond, the petitioner shall be released from custody, pending his appeal to this Court."

Witness my hand and the Seal of the Circuit Court of Dallas County, Alabama, this the 2nd day of April, 1962.

Marguerite H. Houston, Clerk of the Circuit Court of Dallas County, Alabama.

[fol. 140]

IN THE CIRCUIT COURT OF DALLAS COUNTY
STATE OF ALABAMA

CERTIFICATE OF SEPARATE EXHIBITS—August 31, 1962

I, Marguerite H. Houston, Clerk of the Circuit Court of Dallas County, Alabama, hereby certify that Plaintiff's Exhibits numbered as follows:

- No. 3 Picture
- No. 4 Picture
- No. 5 Picture
- No. 6 Picture
- No. 7 Picture
- No. 12 Picture

- No. 13 Picture
- No. 14 Picture
- No. 15 Picture
- No. 16 Picture
- No. 28 Picture
- No. 29 Picture
- No. 30 Picture
- No. 31 Picture
- No. 32 Picture
- No. 33 Picture

and Defendant's Exhibits numbered as follows:

A. Newspaper Clippings

in the Case of The State of Alabama versus Jesse Elliott Douglas could not be copied into the Record and are being forwarded under separate cover.

Witness my hand this the 31st day of August, 1962.

Marguerite H. Houston, Clerk of the Circuit Court
of Dallas County, Alabama.

[fol. 141]

IN THE CIRCUIT COURT OF DALLAS COUNTY
STATE OF ALABAMA

CERTIFICATE OF SEPARATE EXHIBITS—August 31, 1962

I, Marguerite H. Houston, Clerk of the Circuit Court of Dallas County, Alabama, hereby certify that Plaintiff's Exhibits numbered as follows:

- No. 2 Shotgun Shell
- No. 8 Wadding
- No. 9 Wadding
- No. 18 Car Tag No. 1A-37506
- No. 19 Paper Sack and Box of Shells
- No. 20 Shotgun Cleaning Outfit
- No. 21 Ammo-Belt and Shells
- No. 22 Fender Protector Cloth
- No. 23 Gun Case
- No. 24 Gun Case

No. 25 Rifle

No. 26 J. C. Higgins Shot Gun

No. 27 Winchester Shot Gun

in the Case of The State of Alabama versus Jesse Elliott Douglas could not be copied into the Record and were forwarded to you under separate cover in the Case of The State of Alabama versus Olen Ray Loyd.

Witness my hand this the 31st day of August, 1962.

Marguerite H. Houston, Clerk of the Circuit Court
of Dallas County, Alabama.

[fol. 142] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 143]

IN THE COURT OF APPEALS OF ALABAMA

JUDICIAL DEPARTMENT

October Term, 1963-64

2 Div. 61

JESSE ELLIOTT DOUGLAS

v.

STATE

Appeal from Dallas Circuit Court

MINUTE ENTRIES

September 4, 1962

Transcript Filed.

April 4, 1963

Come the parties by attorneys, and argue and submit this cause on motion and on merits.

JUDGMENT—October 8, 1963

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the appellant pay the costs of appeal of this court and of the Circuit Court.

[fol. 143a] [File endorsement omitted]

IN THE COURT OF APPEALS OF ALABAMA
SECOND DIVISION—No. 61

[Title omitted]

Case No. 9392

MOTION OF APPELLANT TO STRIKE PORTIONS OF THE TRANSCRIPT OF RECORD, FOR THE DISCHARGE OF APPELLANT, AND FOR ALTERNATIVE RELIEF—Filed September 21, 1962

[fol. 143b] The appellant in the above styled cause, who was the defendant in the Circuit Court, respectfully shows unto the court as follows:

1. On March 3, 1962 the appellant was convicted in the Circuit Court of Dallas County, Alabama of the offense of assault with intent to murder and sentenced to twenty years imprisonment. The court orally adjudicated him guilty and rendered sentence on March 3, 1962.

2. On September 4, 1962 a transcript of the record was filed in this court by the clerk of the Circuit Court of Dallas County, Alabama. Said transcript is incorrect in that it contains extraneous matters which are not a part of the official records of the Circuit Court as follows:

(a) The entire entry on page 5 entitled "Verdict and Judgment".

(b) The entire entry on page 7 entitled "Sentence".

3. On May 30, 1962 and on one other occasion since that time one of the appellant's attorneys, Charles Cleveland, examined the records of judgments in the above styled case in the office of the clerk of the Circuit Court of Dallas County and in the presence of Mrs. Marguerite H. Houston, who is the clerk of said court. Said attorney requested Mrs. Houston to show him all of the official minutes entries of all judgments and orders entered in said cause. Mrs. Houston showed affiant a record of said cause entitled "Consolidated Docket and Fee Book, Criminal Division, Circuit Court, Case No. 9392" and advised affiant that this was the official record and only record of judgments kept [fol. 143c] in her office. Said attorney personally examined all of the records that Mrs. Houston exhibited to him and there were no entries or records of judgments similar to the entries in the transcript described in paragraph 2 hereof.

4. The appellant's attorney had made a diligent effort to locate all written memoranda of the purported entries described in paragraph 2 entered by either the judge or the clerk on bench notes, docket sheets, minutes, or any other records of said court and has been unable to find any such writings. All of said investigation was made after the elapse of more than thirty days from appellant's conviction and his oral adjudication of guilt by the judge.

5. No notice of nunc pro tunc proceedings seeking to write up the judgment adjudicating appellant guilty have been given to appellant's attorney.

6. There is no valid judgment and no writing in the record from which one can be perfected nunc pro tunc.

Wherefore appellant respectfully moves this court to strike from the transcript of the record the entry on page 5 entitled "Verdict and Judgment" and the entry on page 7 of the transcript of record entitled "Sentence."

Appellant further moves this court to enter an order discharging the appellant from custody, from any further participation in these proceedings and both he and his

sureties from any obligation on his bond filed for his release from custody during the appeals to this court.

In the alternative, appellant moves the court to issue a writ of certiorari in accordance with Rule 18 to correct and perfect the transcript of the record as shown herein, or to bring up the original minutes and records of the Circuit Court.

As a further alternative, appellant moves the court to allow the appellant to file an original petition for mandamus, or alternate writ, directed to the judge and the clerk of the Circuit Court of Dallas County requiring them to file with this court a true and correct transcript of the [fol. 143d] record as shown herein and to suspend all proceedings in this cause until such transcript is filed.

As a further alternative, appellant moves this court to allow him to file nunc pro tunc proceedings in the Circuit Court to establish that the purported judgment written in the transcript is void and is not a valid judgment against appellant, and to suspend all proceedings in this court pending such nunc pro tunc proceedings.

Appellant further moves this court to grant to him such other relief to which he may be entitled in the premises.

Sam Earle Esco, Jr., Bryan Chancey, Charles Cleveland, Attorneys for Appellant.

Sam Earle Esco, Jr., Attorney at Law, 116½ Lauderdale, Selma, Alabama.

Bryan Chancey, Charles Cleveland, Gordon and Cleveland, Attorneys at Law, 321 Massey Building, Birmingham, Alabama.

Duly sworn to by Charles Cleveland, jurat omitted in printing.

[fol. 143e] Certificate of Service (omitted in printing).

[fol. 143f] [File endorsement omitted]

IN THE COURT OF APPEALS OF ALABAMA

[Title omitted]

**APPELLEE'S RESPONSE TO MOTION OF APPELLANT TO STRIKE
PORTIONS OF TRANSCRIPT OF RECORD, FOR THE DISCHARGE
OF APPELLANT, AND FOR ALTERNATIVE RELIEF—Filed Sep-
tember 28, 1962**

Comes the appellee, by and through its Attorney General, MacDonald Gallion, and in response to appellant's motion to strike portions of the transcript of record, for the discharge of appellant, and for alternative relief, would show unto this Honorable Court, as follows:

1. As to Paragraph 1 of appellant's motion, appellee admits the averments thereof.
2. As to Paragraph 2 of appellant's motion, appellee admits that on September 4, 1962, a transcript of the record of appellant's appeal from the Circuit Court of Dallas County, Alabama, was filed by the clerk of said circuit court in this Court; but, further, appellee denies that said transcript of the record is incorrect and that it contains extraneous matters which are not a part of the official record of said circuit court.
 - (a) As to Paragraph 2(a) of appellant's motion, appellee denies the averments thereof.
 - (b) As to Paragraph 2(b) of appellant's motion, appellee denies the averments thereof.
3. As to Paragraph 3 of appellant's motion, appellee neither admits nor denies the verity of its averments, but demands strict proof thereof.
4. As to Paragraph 4 of appellant's motion, appellee neither admits nor denies the verity of its averments, but demands strict proof thereof.
5. As to Paragraph 5 of appellant's motion, appellee neither admits nor denies the verity of its averments, but demands strict proof thereof.

6. As to Paragraph 6 of appellant's motion, appellee denies the averments thereof.

[fol. 143g] 7. Appellee avers that it affirmatively appears that the clerk of the Circuit Court of Dallas County, Alabama, is an officer of said court, and, as such, is authorized to make necessary official entries which record the said court's official proceedings.

8. Appellee avers that it affirmatively appears that the entries entitled "Verdict and Judgment," and "Sentence," the same appearing on pages 6 and 7, respectively, of the transcript of the record filed in this Court, are substantially in the formal words and phraseology normally employed by all circuit court clerks in recording such entries.

9. Appellee avers that it affirmatively appears that the record entries about which appellant complains were made regularly in the ordinary course of business of the Circuit Court of Dallas County, Alabama, and are certified as being correct by the judge and by the clerk of said court.

10. Appellee avers that judgments and minute entries of the Circuit Court of Dallas County, Alabama, are not required by law to be supported by bench notes or other written memoranda of the judge of said court.

11. Appellee avers that under accepted judicial practice in Alabama, there is no requirement that bench notes, minute entries or other written memoranda reflecting the judgment of guilt and the judgment of sentence rendered against a person convicted of crime be made within thirty days after the trial court's oral adjudication of such guilt and sentence.

12. Appellee avers that appellant's motion does not allege or offer to prove that the entries about which he complains were entered fraudulently or in bad faith.

13. Appellee avers that in the absence of a showing of fraud or of bad faith in its entry, a judgment of the Circuit Court of Dallas County, Alabama, a court of record and of competent jurisdiction, is conclusively presumed to be correct.

14. Appellee avers that it affirmatively appears that appellant's motion improperly seeks to attack the judgment of a court of competent jurisdiction, which judgment is certified as being correct and which is conclusively presumed to be correct.

15. Appellee avers that appellant's motion is so vague and indefinite and seeks relief from this Court in so many alternative ways as to render it uncertain and confusing and to make difficult, if not impossible, joinder of issue, or issues, thereon.

[fol. 143h] Wherefore, the Premises Considered, appellee prays that this Honorable Court will enter an order striking, dismissing, and denying the motion of appellant to strike portions of the transcript, for the discharge of appellant, and for alternative relief.

Respectfully submitted,

MacDonald Gallion, Attorney General of Alabama;
George D. Mentz, Assistant Attorney General of
Alabama, Attorneys for Appellee.

Certificate of Service (omitted in printing).

[fol. 144]

IN THE COURT OF APPEALS OF ALABAMA
THE STATE OF ALABAMA—JUDICIAL DEPARTMENT
OCTOBER TERM, 1963-64
2 Div. 61

JESSE ELLIOTT DOUGLAS,

v.

STATE.

Appeal from Dallas Circuit Court

OPINION—October 8, 1963.

CATES, Judge:

Appeal from conviction of guilt of assault with intent to murder, Code 1940, T. 14, § 38: sentence, twenty years imprisonment.

Pages 6 and 7 of the record show the following:

[fol. 145] "VERDICT AND JUDGMENT. March 3, 1962

"Comes the State of Alabama, by its Solicitor, and also comes the Defendant, Jesse Elliott Douglas, in his own proper person and by and with his attorneys, and being duly and legally arraigned in open Court upon the indictment in this cause, for answer to said indictment, pleads and says that he is not guilty in manner and form as charged therein; and issue being joined:

"Thereupon came a jury of good and lawful men, to-wit: Albert S. Champion and eleven others, who having been impanelled and duly sworn according to law, on their oaths say, 'We, the Jury, find the Defendant guilty of assault with the intent to murder

as charged in the indictment. Albert S. Champion,
Foreman.'

"THE STATE OF ALABAMA,) IN THE CIRCUIT COURT OF
Plaintiff)
VERSUS) DALLAS COUNTY, ALABAMA
)
JESSE ELLIOTT DOUGLAS,) CASE No. 9392
Defendant)

SENTENCE

March 3, 1962

"Directly the Court completed the poll of the jury, the defendant, Jesse Elliott Douglas, was called before the Court in the presence of his counsel and the following proceedings were had:

"The Court: Do you have anything to say why the judgment of the Court should not be pronounced against you at this time?

"The Defendant: No, sir.

"The Court: According to the verdict of the jury finding you guilty of assault with intent to murder, as charged in the indictment, you are accordingly adjudged to be guilty of assault with intent to murder as charged in the indictment, and as punishment for said offense you are sentenced to the penitentiary of Alabama for a period of twenty years.

"The Court: Is there notice of appeal?

"Mr. Esco: Yes, sir.

"The Court: The Court will set your appeal bond at \$50,000.00.

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•

[fol. 146] "The undersigned, James A. Hare, as Presiding Judge in the trial of the above styled cause in

the Fourth Judicial Circuit of Alabama, does hereby certify that the proceedings above recited are true and correct as to sentence pronounced on the defendant, Jesse Elliott Douglas, in the Circuit Court of Dallas County, Selma, Alabama, on the 3rd day of March, 1962.

/s/ JAMES A. HARE
Presiding Judge"

Douglas moves this court to strike the portion of the transcript above quoted.

Douglas further prays that he be discharged—presumably on the ground that the above quoted matter is not a minute entry within the meaning of the statutes and rules governing the minutes of circuit courts. Code 1940, T. 7, §§ 1-5; T. 13, § 198, as amended (particularly subsec. 8).

We consider that this motion is not well taken because the appellant has failed to allege or show that the quoted entry does not represent what actually transpired.

Douglas does not allege that the foregoing entry is untrue. Hence, if we are to consider the appeal at all, we must accept this entry. There must be a judgment of conviction before there can be an appeal. Code 1940, T. 15, § 368; *Vick v. State*, 156 Ala. 669, 46 So. 566 (opinion in So. Rep. only); *Moss v. State*, 140 Ala. 199, 37 So. 156; *Ex parte Loyd*, — Ala. —, 155 So. 2d 519.

The tendencies of the evidence were:

William C. Smith, a physician and surgeon of Selma, Alabama, testified as follows:

"Q. Sometime during the day of January 18, 1962, did you have one Charles Layman Warren as a patient? A. Yes.

"Q. Where did you first see him, Doctor? A. In the emergency room at the New Vaughan Memorial Hospital.

[fol. 147]

"Q. Will you describe those injuries, Doctor? A. He had injuries to his chest on the left side which apparently was caused by a gun shot of some sort.

"Mr. Esco: Now, if your Honor please, he can answer the question, but a further description of the injuries is not responsive.

"The Court: Overrule.

"Mr. Esco: We except, if you please.

"Q. Proceed. A. Injuries caused a partial collapse of his lung on that side and also some bleeding inside of the chest. He had other minor injuries, nicks and cuts.

"Q. Did you xray his body? A. Yes, sir.

"Q. Did the xrays show further injuries? A. Well, they showed the injuries to his lung on the left side and other organs inside his chest, and there was bleeding in his chest.

"Q. And did the xrays show any foreign matter in his chest? A. Yes, there were several metallic fragments. Two of these were about a quarter of an inch in diameter, and some very small minute particles.

"Q. Did you perform any minor or major surgery on him? A. Yes, sir, I put a small tube into his chest to remove the air and blood that had accumulated, and to remove any more that might be there subsequently.

"Q. Now, you said something about one of his lungs partially collapsing. Tell us about that, Doctor. A. Well, the left lung was collapsed approximately 10% to 15% of its normal size. This apparently was caused by escapement of air from his lung into his chest.

"Q. Doctor, from your experience as a doctor and from your observation of these injuries that you have just described, were they the type of injuries that could have caused death? A. Yes, I think they could have.

"Q. Were they the type of injuries that cause grievous bodily harm? A. Yes, they were serious injuries.

"Q. How long did this man stay in the hospital, Doctor? A. Twelve days."

Mr. Warren testified that early in the morning of January 18, 1962, he was driving a West Brothers truck pulling a Bowman Transportation trailer. He had left Birmingham [fol. 148] for New Orleans via U. S. Highway 11 south to Woodstock, Alabama. There he turned off on Highway 5 to the south. As he got near the crossing of Highway 5 and U. S. 80 at Brown's in Dallas County:

" * * * I met an on-coming car, and when it got even with me I heard a bam-bam, and I looked over to see if I could see what it was, and I saw the hole in the door and then I knew I was shot. I realized someone had shot me, and I got the truck stopped, and another driver who was with me helped me get across the road and lay down, and he stopped the next car and had them call the ambulance.

"Q. Where did that shot come from? A. It came from the car that I was meeting."

* * * * *

"Q. Did you see a car that night? A. Yes, sir.

"Q. About the time you were shot? A. You mean around the time I was shot?

"Q. Yes. A. About—oh, I would say a few minutes before I was shot, there was a white '59 Ford passed me, and it was going the same way that I was going.

"Q. And how long after that was it before you were shot? A. It was a very short time. I couldn't give you the exact minutes, but I'd say a few minutes—a matter of a few miles.

"Q. Were you able to observe the automobile tag on that car? A. The one that passed me?

"Q. Yes. A. Yes, sir, it was a 1-A tag.¹ I didn't read the numbers on it." (Emphasis supplied.)

¹ The first number on an automobile license tag denotes county of the person who, on October 1 the beginning of the license year, is the registered owner, viz., "1" (including letter suffixes "A" and "B") for Jefferson, "2" for Mobile, "3" for Montgomery, then (in alphabetical order) "4" for Autauga, and so on through "67" for Winston. The prefix for Etowah County is 31.

The State's second witness was Mr. Edward Gorff, who was also driving for West Brothers running some 65-70 yards behind Warren:

"Q. And in what position were you and Mr. Warren traveling? A. He was in front.

[fol. 149] "Q. And who was behind? A. Warren was in front and I was in the truck following him.

"Q. And did you attempt to pass him? A. Well, I was fixing to pass him and stop and tell him let's eat before we got way down the road.

"Q. And did something happen to prevent you from passing him? A. Yes, sir. We met a car.

"Q. Now, previous to that, had an automobile passed you going south? A. Yes, sir.

"Q. Did you get a look at that car? A. Yes, sir.

"Q. What color was it? A. White.

"Q. What make and model? A. '59 Ford Galaxie.

"Q. Did you observe the tail lights on that Ford? A. Yes, sir.

"Q. How many tail lights did he have? A. Had one burning and one was burned out.

"Q. Which one was burning and which one was burned out? A. The right one was burned out and the left was shining.

"Q. And had you gotten close to him—did you hear a shot that night? A. Yes, sir.

"Q. And had you gotten up close behind Warren when that happened? A. Yes, sir.

"Q. Approximately how close were you to him? A. Approximately sixty-five or seventy yards.

"Q. And just tell us what you saw and heard and observed there, just when you got to Highway 80. A. We met this car. And I was fixing to pass him and I saw a car come over the hill and I fell back behind him. I was getting up close enough so I could stop him at the junction, and the car lights blinded me and I pulled back over to the right side of the road as far as I could to keep the lights from blinding me so I could see when he got around, and I heard this shot, and Warren put

on brakes and pulled off to the side of the road. I was next, so I pulled off too, to see what was wrong.

"Q. The car that was meeting you, do you know whether his lights were on bright or dim? A. Well, four of them shining. I imagine they were on bright.

"Q. And after you heard this shot, did that car have to come on then by you? A. Yes.

"Q. Did you look at it? A. Well, I seen it was a [fol. 150] white car is all I could tell, because the lights were on bright, and that's about all the time I had to see — close together.

"Q. And you could tell what color it was? A. Yes, sir.

"Q. What color was it? A. It was a white car.

• • • • •
"Q. And when this car first passed you going south, did you observe the tag number? A. Yes, sir.

"Q. And what was the prefix on there? What county was it from? A. Jefferson county.

• • • • •
"Q. The next afternoon did you go to Anniston, Alabama, with Captain Thornton of the Alabama Highway Patrol? A. Yes, sir.

"Q. And where did he carry you?

"Mr. Esco: We object to all this. This is too remote from the scene. Not part of the res. and has nothing to do with this case.

"The Court: Overrule at the present time.

"Mr. Esco: We except, if you please.

"Q. Where did you go in Anniston? A. Highway Patrol office.

"Q. Did you see an automobile there? A. Yes, sir.

"Q. Describe the automobile that you saw there.

"Mr. Esco: We object, your Honor. This is too remote from the scene of the res. The next afternoon, has nothing to do with this case whatsoever, what he saw the next afternoon some hundred miles or more away.

"The Court: Overrule.

"Mr. Esco: We except.

"Q. Go ahead. A. I saw a white '59 Galaxie Ford.

"Q. Was that the same Ford you saw the night before?

"Mr. Esco: Your Honor please, we object.

"Q. In your opinion.

[fol. 151] "Mr. Esco: If he can identify it in some way. And we also object on the ground it is too remote.

"The Court: Overrule.

"Mr. Esco: We except.

"A. I would say it was the same Ford. Only difference it had a different kind of tag on it, had an Etowah County tag on it."

About 5:00 A. M. January 18, Mr. J. E. Williamson, a State Highway Patrolman, was tending a road block some sixty miles north of Brown's Station at the junction of U. S. 11 and Alabama 5. A car came to the road block "from toward Tuscaloosa":

"Q. When this automobile arrived at the intersection, which way did he go then? A. Turned down Highway 5 on south.

"Q. Did you stop him? A. Yes, sir.

"Q. Did you check his car? A. Yes, sir.

"Q. Who was driving that car? A. Olen Loyd.

"Q. Did you see Mr. Douglas in there? A. Yes, sir.

"Q. Where was he sitting? A. Sitting on the front seat with him.

"Q. Did you check that car? A. Yes, sir.

"Q. Did you see anything in that car? A. Yes, sir, I saw some clothing in the back-seat.

"Q. Did you check the trunk of that car? A. Yes, sir.

"Q. What did you see there? A. Well, I saw a shotgun case and shell box and two lights mounted on a board and some wires.

"Q. How did you know—you say one of them was named Douglas. How did you know his name was Douglas? A. Checked his Social Security card.

"Q. You testified there were some shells back there.
Did you—

"Mr. Esco: We object to leading questions.

"Mr. McLeod: That's not a leading question, your Honor. That's not leading. I said, 'You testified—' and then my question comes thereafter.

[fol. 152] "Q. Did you testify awhile ago that you saw some shells? A. I saw a shell box.

"Q. Did you see what type of shells, what make? A. The brand on them was Peters high velocity.

"Q. Did you stop these men? I mean, did you hold them? A. Well, we checked them for several minutes, yes, sir.

"Q. What did you do then? A. We wrote down the information and turned them loose.

"Q. After that automobile drove off—well, first I'll ask you, which way did it go then? A. It headed on south on Highway 5.

"Q. As that car drove off, did you observe the back of it? A. Yes, sir.

"Q. Did you observe the tail lights? A. Yes, sir.

"Q. What was their condition? A. One tail light was out.

"Q. Which one? A. I don't recall which one was out.

"Q. What kind of car were they driving? A. Driving a '59 white Ford.

"Q. Did you later on see that car again? A. Yes, sir.

"Q. Where did you see it? A. Over in Anniston.

"Q. That same day? A. Yes, sir.

"Q. The car you saw in Anniston, was that the same car you saw at the intersection of Highways 5 and 11 that Mr. Douglas was in? A. Yes, sir."

Loyd and Douglas were stopped in Ohatchee, Calhoun County. The policeman who stopped them searched the front of the car and found a shotgun. A pump gun was in the trunk. Neither Loyd nor Douglas objected to being stopped nor to the search of the car.

Two State Highway Patrolmen and the city officer took Loyd, Douglas, and the white '59 Ford to the Highway Patrol station in Anniston.

W. R. Jones, an investigator, Department of Public Safety,² testified that he "carried" Douglas from Anniston [fol. 153] to Birmingham. There Sheriff Clark of Dallas County arrested Douglas on a warrant. Jones also took the 1959 white Ford to Birmingham and had a Capt. Godwin drive it to Montgomery. There it was turned over to a member of the State Toxicologist's staff.

At Anniston, Jones had found in the car the following:

- (1) An automobile license tag for the license year expiring September 30, 1962, and bearing No. "1A-37506"—discovered under a floor mat;
- (2) a shotgun in the trunk;
- (3) another shotgun beneath the back seat; and
- (4) a rifle in the dust pan between the car's grill and radiator.

The State then called Olen Ray Loyd (defendant-appellant in *Loyd v. State*, 2 Div. 60). To all questions put him—except his name and address—he declined to answer.

Mr. L. C. Crocker, a deputy sheriff of Dallas County, testified that January 21, 1962, going north from the place of Warren's being shot, he searched some eight hours along the right of way of Highway 5 for some nine and one-half miles. At this point, he found an ejected shotgun shell lying about ten feet four inches from the margin of the paving. This shell came into evidence as State's Exhibit 2.

Mr. Crocker passed this empty shell to Mr. Robert B. Finley, a member of the State Toxicologist's staff.

Finley testified that:

² This new arm of government to absorb and enlarge upon the old Highway Patrol was created in 1953. Act No. 585, September 11, 1953. " * * * Members of the state highway patrol when so authorized in writing by the governor shall have the power of peace officers in this state, * * * " Code 1940, T. 36, § 71. See *Roberts v. State*, 253 Ala. 565, 46 So. 2d 5.

(1) He saw the empty shotgun shell (Exhibit 2) on the roadside where Mr. Crocker found it.

[fol. 154] (2) He saw, at a truck stop at Browns in Dallas County, the tractor truck which Warren was driving when he was shot.

(3) He saw, at the Highway Patrol headquarters in Montgomery, a white 1959 Ford car with a 1962 tag, 1A-37056, under the front seat.

(4) He saw a Winchester shotgun in the rear seat of this car.

(5) He saw a quantity of "Peters" OO magnum load, 12-gauge shotgun shells in this car.

(6) He saw a plastic wad in the tractor truck.

(7) He took a similar wad from one of the "Peters" OO magnum load 12-gauge shotgun shells which he found in the 1959 Ford.

(8) He had never seen any wadding of this type except in "Peters" OO magnum load shells.

(9) He had fired a "Peters" OO magnum load 12-gauge shotgun shell in the Winchester shotgun with the firing pin leaving a distinctive imprint "of a small defect" in the hull of the shell.

(10) He observed the hull found on the road (Exhibit 2) and the hull he test fired in the gun under a comparison microscope.

(11) In his opinion, both hulls had been fired from the Winchester shotgun.

(12) From shooting through cardboard, he was of the opinion that when fired the distance from the gun was "not greater than eight feet from the tractor."

Because of points in Douglas's brief, we set forth three excerpts from the evidence:

³ Photographs which Finley took show the car with Etowah County tags (31-27514).

[fol. 155] 1. Testimony of Robert B. Finley (from p. 107):

"Q. Mr. Finley, will you show that picture to the jury and explain it to them? A. (The witness stands before the jury) On all fire arms there are markings that are true marks and which when a shell is fired in a particular weapon those marks are left on the shell. So we can take a questioned shell and a test shell which we fired from a weapon—in this case, a shotgun—and under a double microscope, each one under a separate microscope in which they are connected, enabling us to see a portion of each hull at the same time. These markings, true markings that are on the weapon, are left on the hull when the shell is fired. If we are able to match up these markings where they will continue across the split image here (indicating)—in other words, this being the test round which I fired and this is the test hull which was found on the highway, if we are able to show a continuation of these markings that is indication that the evidence hull was fired in the particular shotgun in question.

"Q. Now, from your checking of that, are the markings similar? A. Yes, sir.

"Q. And from this test that you ran and other tests, are you of the opinion that the hull that you found on the highway, Highway No. 5, and the test hull were both fired from the same shotgun? A. It is my opinion that they both were, that the hull found on Highway 5 was fired from this shotgun.

"Mr. Esco: If your Honor please, we move to exclude on the grounds that this man has not been qualified as an expert in the field in which he is now testifying. We move to exclude his testimony.

"The Court: Overrule.

"Mr. Esco: We except, if you please."

2. Testimony of Robert B. Finley (from pp. 111-112):

"Q. Mr. Finley, did you make some test shots to ascertain the distance, how far that would be, to make the hole that was made in that vehicle? A. Yes.

"The Court: Just a moment. Do you want to take him on voir dire?

"Mr. Esco: I would like to read into the record that the solicitor is now demonstrating to this witness and before this jury a group of cardboard cards in which there are various holes, showing what I expect is a shotgun pattern, and which he is asking this witness [fol. 156] about. We certainly object to the showing of those to the jury or any testimony concerning them. They are not the same material, metal, and there has been no proper predicate laid showing what conditions the tests were made in.

"The Court: Objection is overruled.

"Mr. Esco: We except, if you please.

"Q. Mr. Finley, I will show you a cardboard marked for identification purposes as Plaintiff's Exhibit No. 37, and ask you do you recognize that? A. Yes.

"Q. And what do these holes in here represent? A. That represents a pattern in which I fired from this Winchester shotgun at a distance of eight feet.

"Q. Will you show that to the jury?

"Mr. Esco: If your Honor please, we object to it. It is not in evidence and we object. Let the record show he is showing a cardboard pattern with evidence shotgun holes in it to the jury. We object on the grounds that it is not a fair comparison of the thing to be tested against, which is metal, and he is showing cardboard here; and he has laid no predicate to show that this is a comparative metal or a comparative pattern that's been made. It is not a fair comparison.

"The Court: Overrule.

"Mr. Esco: We except.

"Q. Is there any distinction in the pattern if it is shot into cardboard or if it is shot into metal?

"Mr. Esco: We object to his answering unless the predicate has been laid showing him to be an expert.*

* The learned trial judge correctly sustained objection to a question using the word "criminalist" to characterize Finley. We

[fol. 157] "Mr. McLeod: I qualified him.

"Q. In your opinion are they similar when they are fired into cardboard or fired into metal? A. Well, no, I believe in metal is somewhat of a different—

"Mr. Esco: (Interrupting) We object. He has answered the question, he said no.

• • • • •
"Q. Can you make a comparison by these tests that you were just testifying to? A. I can use the test to form an opinion.

"Q. And the opinion that you have formed, how far was the shotgun away from the tractor when it was fired into?

"Mr. Esco: We're going to object, your Honor, unless the proper predicate is shown to show how he knows what he knows, whether or not he is qualified as an expert, whether or not he under the same conditions has made a test in a speeding automobile against a speeding truck, of the same metal that was involved in the vehicle hit, same shell was used, same brand and type and size was used, and the same age shell as far as that's concerned.

"The Court: Overrule.

"Mr. Esco: Exception, if you please.

have found no statutory definition of "criminalist." Webster's 2nd International Dictionary: "Criminalist. 1. One versed in criminal law. 2. One addicted to criminality; also a psychiatrist dealing with criminality." Webster's Third New International Dictionary retains 1 but changes 2 to "2: a specialist in criminology."

In *P. v. Taylor*, 152 C. A. 2d 29, 312 P. 2d 731, the court's opinion implies that the word "criminalist" seems to have no single fixed meaning. Upon consideration of criticism leveled at Webster's Third (e.g., *Saturday Review*, September 30, 1961, Vol. 44:19-20, November 10, 1962, Vol. 45:70; *Time*, October 6, 1961, Vol. 78:49—"*** more a *Social Register* of words than a Supreme Court of language."); *Science*, November 10, 1961, Vol. 134: 1493), we cannot accord it authority superior to that of the Second Edition. See *Adler v. State*, 55 Ala. 16; *Cook v. State*, 110 Ala. 40, 20 So. 360.

"Q. Answer. Do you remember the question? A. Will you read it, please?

"Court Reporter: (Reading from her notes) 'And the opinion that you have formed, how far was the shotgun away from the tractor when it was fired into?'

"A. It is my opinion that it was a distance *not greater than eight feet.*

"Mr. Esco: We move to exclude the testimony.

"The Court: Overrule." (Italics supplied.)

3. Testimony of Robert B. Finley (from pp. 114-115):

"Q. Now Mr. Finley, this wadding that you said you removed from double 'O' buckshot, during your four and a half years experience as a criminalist for the State of Alabama have you ever seen any wadding of this type except in Peters double 'O' magnum load?"

[fol. 158] "A. No.

"Q. Do you have available to you at the State Department of Toxicology's laboratory numerous shells that are manufactured in the United States? A. Yes.

"Q. And do you have—in the laboratory do you have shells of all types that you know of as being manufactured in the United States? A. We have numerous shells but I don't know that we have one of every type.

"Q. Is it every type that you know of? A. Yes.

"Q. Now, Mr. Finley, is this the only type of wadding that is used in a gun? A. No.

"Q. What other type is used? A. Hair type of wadding."

"Q. Were there other shells found in the car? A. Yes.

"Q. Were shells found in the ammo belt? A. Yes, sir.

"Q. Were there shells found in that Peters box in there? A. Yes, sir.

"Q. And was it a great many of them? A. Yes, sir.

"Q. Now, Mr. Finley, I will show you Plaintiff's Exhibit No. 10, and ask you do you recognize that?

A. Yes.

"Q. I will show you Plaintiff Exhibit No. 11, and ask you do you recognize tha A. Yes.

"Q. And where did you find that ammunition? A. This, I found double 'O' magnum load in this automobile; and this one, double 'O' magnum, which I purchased myself."

Douglas adduced no evidence, and did not except to the oral charge. In brief, he makes no contention that the court erred in the refusal of any charge tendered by him in writing. Code 1940, T. 7, § 273.

Appellant's brief contends for the following propositions:

1. No legal evidence was before the grand jury, hence the court should have sustained defense motion to quash the indictment.
- [fol. 159] 2. On hearing this motion, the court erred in excluding questions as to evidence before the grand jury.
3. "Evidence does [not] support a conviction af assault with intent to murder because the State's own evidence negates such an intent."
4. No predicate of substantially similar conditions was laid for evidence of out of court experiments.
5. Newspaper accounts prejudiced defendant, hence his motion to continue should have been granted.
6. Minutes are the only proof of judgments.
7. Offering inadmissible evidence before a trial jury ground for mistrial if the evidence is capable of provoking prejudice against the defendant.
8. "Arraignment is absolutely [sic] in Alabama."

I.

The Motion to Quash

We group here the first two of appellant's contentions: (A) as to their being no legal evidence before the accusing jury; and (B) the trial judge's excluding evidence sought from the grand jurors at the hearing on this motion to quash.

A. No Legal Evidence

The record before us. (p. 4) shows a motion listing six grounds: (1) "not sufficient legal evidence"; (2) no "legal evidence" to establish corpus delicti; (3) "did not have competent witnesses or legal documentary evidence" before them; (4) no legal evidence to indict defendant; (5) indictment was based solely on a confession extorted from an alleged accomplice, Olen Ray Loyd; and (6) that Loyd's confession came from violation of the McNabb rule.⁵

[fol. 160] The first witness called by the defense in aid of the motion was a grand juror. He testified that the only evidence before the grand jury was the testimony of the sheriff. Included in this was a written confession of Loyd which the sheriff read to the grand jury.

On cross (by the State), the grand juror's testimony was in part:

"Q. Did Mr. Clark testify and tell you that a man had been shot out here on No. 5 highway by the name of Charles L. Warren? A. Yes, sir. I'd already stated that.

"Q. And did he testify to other facts involved in that crime? A. Yes, sir.

"Q. And did Sheriff Clark give the grand jury evidence that the defendant, Jesse Elliott Douglas, was involved in that shooting? A. Yes, sir.

"Q. And beside his testimony did he have a legal document before you? A. He had a document, yes, sir."

⁵ *McNabb v. United States*, 318 U. S. 332. See Busch & Harwood, Confessions, 22 Ala. Lawyer 272.

On redirect the defendant's counsel summarized and had the witness adopt as follows:

"Q. And Sheriff Clark, as the only witness appearing, told you that a man had been shot, that he had some evidence that was being examined by the toxicologist, and he had a purported confession. Is that all of the evidence that he had connecting Mr. Douglas with this crime? A. That's all I can think of at this time."

Another juror was called and stated that the sheriff proffered a shotgun shell as well as the signed confession. Part of his examination in chief went:

"Q. Did he bring you any direct evidence at all that a crime had been committed? A. Well, we knew about that. Yes.

"Q. How did you know, Mr. Coffee? A. Well, we knew about the man in the hospital that had received the wound.

"Q. How did you know about that? A. Well, we was told about it.

"Q. By whom? A. Well, the sheriff, for one.
[fol. 161] "Q. Before the grand jury? A. We knew that was the reason he didn't appear there.

"Q. You were told by the sheriff about the man in the hospital? A. Yes.

"Q. And what were you told by the sheriff about him?

"Mr. McLeod: I object to that question.

"The Court: Sustain the objection.

"Mr. Esco: We except, if you please.

"Q. Did you yourself observe the man in the hospital? A. No.

"Q. Did any man on the grand jury? A. Not to my knowledge.

"Q. Did any other witnesses appear before the grand jury except Sheriff Clark? A. I don't believe so."

And from redirect we quote:

"Q. The evidence related from somebody else's confession, Mr. Coffee, is that right? A. Yes.

"Q. And that's the only way you connected Mr. Douglas, with somebody else's purported confession, signed by a purported accomplice, was the only evidence before the grand jury connecting Mr. Douglas with this incident. Is that right? A. Basically I guess that's right, because—as I remember, the information that we had came from the confession and from the investigation of the sheriff, which were related to us.

"Q. And did he demonstrate to you anything that was a result of that investigation? A. You mean what he found out?

"Q. No, what he found. Did he find any physical evidence that he demonstrated to you? A. You mean by physical evidence objects?

"Q. That's right. A. Well, the shell I guess would be a physical object.

"Q. You mean by 'the' shell, you mean by 'a' shell? A. Yes. Or physical objects, they had guns taken from the automobile.

"Q. You had guns before the grand jury? A. No, not before the grand jury, but he told us about guns that they had.

[fol. 162] "Q. Well, to the best of your knowledge Sheriff Clark was testifying purely from what he had been told, was he not? A. Well, that and what he had found out with his investigation.

"Q. At no time did he tell you that he had observed the shooting or escaping car or anything surrounding the incident himself, did he? A. No.

"Q. And this purported confession that you saw was a handwritten document. Did you recognize that handwriting? A. No, I didn't recognize the handwriting.

"Q. And did you recognize anything about it that would indicate to you that you knew who had written it or signed it? A. No. I had to go on what I was told.

"Q. And do you know that it was purportedly written by an accomplice of Mr. Douglas? A. Yes.

"Q. But it was not written, signed, or witnessed by Mr. Douglas, was it? A. I don't believe so."

Indictments must come from evidence either (a) given viva voce by witnesses before the grand jury or (b) furnished by documents laid before that body. Sheriff Clark's having been a witness before the grand jury is enough to comply with Code 1940, T. 30, § 86, which reads in pertinent part as follows:

"§ 86. In the investigation of a charge for any indictable offense, the grand jury can receive no other evidence than is given by witnesses before them, or furnished by legal documentary evidence; * * *

This section permits a grand jury to indict on hearsay alone, if furnished by a witness before the grand jury. *Washington v. State*, 63 Ala. 189; *Costello v. United States*, 350 U. S. 359; *Jones v. State*, 81 Ala. 79, 1 So. 32; *Agee v. State*, 117 Ala. 169, 23 So. 486. Younger, Case Note, *IX Ala. Law Rev.* 92.

Lack of cross-examination is the bedrock of the exclusion of hearsay before trial juries. Before a grand jury the suspect is given no opportunity to be represented. Hence, hearsay exclusion would be without the adversary means to implement it. *Clark v. State*, 240 Ala. 65, 197 So. 23; [fol. 163] *Fikes v. State*, 263 Ala. 89, 81 So. 2d 303; *Gandy v. State*, 32 Ala. App. 513, 27 So. 2d 798. Cases such as *Walker v. State*, 17 Ala. App. 555, 86 So. 257, must be viewed as ignoring the effect of *Washington*, supra.

The confession of Loyd was inadmissible before a petty jury trying Douglas under the rule of *Connelly v. State*, 30 Ala. App. 91, 1 So. 2d 606. But since the hearsay exclusion does not operate before a grand jury, then *Connelly* would not affect the indictment against Douglas.

B. Details of Evidence before Grand Jury

The weight, credit and quantity of what evidence a grand jury receives is not a matter of enquiry once it is shown that that body had either a witness or a document before it. The trial judge was not in error. *Gaines v. State*, 146 Ala. 16, 41 So. 865, following the leading case of *Sparrenberger v. State*, 53 Ala. 481.

II.

Evidence of Intent to Kill

Appellant's brief, in arguing proposition III, states:

"The state offered no facts which indicated an intent to kill Mr. Warren. The only facts from which such an intent could possibly be inferred is the use of a shotgun. However, the circumstances clearly negate an intent to kill." The state's evidence shows that the assailant knew that Mr. Warren would be encased in a heavy steel body of the tractor truck he was driving. The choice of a shotgun instead of a rifle was intentionally made to avoid the possibility of someone getting killed. Although some shot did penetrate the tractor door and injure Mr. Warren, it was not with sufficient force to kill him. Had the assailant intended to kill, he would have used the rifle and shot Warren when he passed going in the same direction. Certainly no intention to kill can be inferred from the discharge of a shotgun between two vehicles traveling at high speeds and in opposite directions."

[fol. 164] This argument, if based on uncontradicted proof of Warren's being in an armored vehicle, might have had some force with the jury. However, four of the exhibits (3, 6, 13 and 32) introduced by the prosecution show the window ledge and pane of the tractor cab torn open. This hole is consistent with the evidence of its being made with a shotgun.

The physician's testimony and Warren's evidence afforded the jury a description of wounds which, in our opin-

ion, are sufficient when coupled with the use of a deadly weapon to support an inference of malice.

Under assault with intent to murder punishable under Code 1940, T. 14, § 38, the word "murder" is contextually that of the Common Law, i. e., killing of a rational (human) being with malice aforethought. Hence, malice must be established. *Latcher v. State*, 145 Ala. 669, 39 So. 922 (opinion in So. Rep. only).

In *Walls v. State*, 90 Ala. 618, 8 So. 680 (modifying *Smith v. State*, 88 Ala. 23, 7 So. 103), we find (p. 622) an admonition to charge juries as to the need to find from all the evidence that the accused intended to take the life of the victim of his assault. See *Horn v. State*, 98 Ala. 23, 13 So. 329, as to need for "facts [to] raise the presumption of intent to murder."

Ray v. State, 147 Ala. 5, 41 So. 519, states that use of a deadly weapon near enough to fatally wound may support a jury's inferring (shown by verdict) the malicious character of the assault.

Proof of both intent to kill and malice must exist. Both can be inferable from the same act of using a deadly weapon unless the circumstances (e. g., self defense) refute either such intent or malice. *Sparks v. State*, 261 Ala. 2, 75 So. 2d 103.

[fol. 165] We consider the question here was one of fact; therefore, within the jury's province and not reviewable on appeal. Loyd's confession did not come into evidence against Douglas so that whatever Loyd said therein is not relevant.

III.

Out of Court Experiments

In ground 62 of his motion for new trial Douglas assigned that "the court erred in overruling the defendant's objections to the testimony of Robert B. Finley."

Presumably, he refers to rulings as to Mr. Finley testifying as to tests he made wherfrom he determined that the shot into Warren's tractor cab was made from not more than eight feet away. Cf. Anno. 86 A. L. R. 2d 611; § 6, at p. 643.

In the second excerpt quoted above from Finley's testimony, there are three objections to plaintiff's Exhibit 37, a piece of cardboard into which Finley had fired the Winchester shotgun. This series of objections runs:

- (1) a) "not the same material, metal"; and
b) no showing of conditions "tests were made in";
- (2) "not a fair comparison"—metal versus cardboard; and
- (3) not under same conditions (a) speeding automobile vs. speeding truck, (b) same metal, (c) same shell, i. e., brand, type and size, (d) same age shell.

Under the majority opinion in *Straughan v. State*, 270 Ala. 229, 121 So. 2d 883, the pattern of shot scattering from a shotgun is not legally in the realm of common knowledge. One shown to be an expert can testify as to his opinion as to the distance from muzzle to target. Brock, the scattering [fol. 166] expert, was properly allowed to base his opinion on (a) the gun and (b) the area of the body covered by the shot.

Whether the subject's being beyond common knowledge would make inadmissible a layman's evidence of out-of-court experiments in this field, we need not decide. Exhibit 37 was not introduced and was not certified with the record, hence we consider our review is limited to whether the State established Finley's qualifications as an expert witness on the pattern of scattering of shot from a shotgun so as to testify on hypothetical assumptions.

Finley (R. p. 103) testified he had had a period of four and one-half years of training with the State Toxicologist's bureau. During that time he had "tested" from 400 to 500 firearms of which 150 to 200 were shotguns. Considering the proof of Finley's testing some 150 to 200 pieces, we see no abuse of the trial court's discretion in view of the express holding in *Straughan*, *supra*.

Familiarly, the expert is someone with knowledge which the trial judge deems superior to that of the average man. Though Finley disclaimed himself as possessing special knowledge of "ballistics" we take it he was using this term

in the sense of one who is skilled in comparing striations in bullets imparted by the lands and grooves of guns having rifled bores. *Evans v. Commonwealth*, 230 Ky. 411, 19 S. W. 2d 1091, 66 A. L. R. 360; Wigmore, Note (warning against charlatan witness), 25 Ill. Law Rev. 692; 5 Am. Jur., Proof of Facts, Firearms Identification, at p. 126.

IV.

Opinion as to Shotgun Shell

[fol. 167] Finley's testimony as to the hulls having been fired from the Winchester shotgun was properly predicated. In *Kyzer v. State*, 250 Ala. 279, 33 So. 2d 885, it was proper for a jury to compare an "evidence shell" with two "test shells" fired from the evidence gun.

Here Finley demonstrated his path of research by means of exhibits including large photographs of the "evidence shell," the breech block and firing pin of the "evidence gun" and "test shell." See *Kent v. State*, 121 Tex. Cr. 396, 50 S. W. 2d 817.

Certainly some firearms tests cannot be made in the courtroom. The reasoning of *Ferrell v. Commonwealth*, 177 Va. 861, 14 S. E. 2d 293, amply supports the trial judge.

V.

Motion for Continuance Because of Newspaper Reports

Warren, when shot, was driving a West Brothers truck pulling a trailer of Bowman Transportation Company. This latter company was engaged in a labor dispute with its drivers.

In oral argument there was some contention that violence which attends labor disputes is a phenomenon furnishing a legal justification similar to that claimed for those engaged in sports or warfare. This argument was made but rejected as a legal factor in defense of criminal charges in *Peyton v. State*, 40 Ala. App. 556, 120 So. 2d 415.

Much as the motor vehicle's making death more frequent without mitigating manslaughter, so outbursts of industrial

friction must be treated by common law standards unless the Legislature should direct otherwise.

Along the same line as the contention of one ground of Douglas's motion for continuance were his Exhibits A, B, C, and D, clippings from The Selma Times-Journal, The [fol. 168] Birmingham Post-Herald, The Birmingham News, and The Montgomery Advertiser. These were claimed to have made it impossible to strike an unbiased jury.

We find no error in the trial judge's overruling this motion. See the opinion of Price, P. J., in the companion appeal of *Loyd v. State*, 2 Div. 60.

VI.

Use of Written Confession to Refresh Recollection of Recalcitrant Witness

A.

Loyd, an accomplice, was convicted the day before Douglas was put to trial. The State called him as a witness against Douglas.

After answering a few preliminary questions, some straightforwardly, others by "Not to my knowledge," or "I'm not sure," Loyd was asked, " * * * if on the night of January 20, 1962, in Selma, Alabama, in the Dallas County jail didn't you make the following statement: 'I, Olen Ray Loyd, make the following statement of my own free will, * * *'"

To which Loyd replied, "I refuse to answer on the immunity of the laws of the State of Alabama and my constitutional rights."

Douglas can take nothing from the ruling of the court on Loyd's claim of immunity from self-incrimination. The privilege is personal. Had Loyd waived it, Douglas would have been confronted with testimony legal to use against him. *Beauvoir Club v. State*, 148 Ala. 643, 42 So. 1040; 8 Wigmore, Evidence (McNaughton rev. 1961), § 2259.

[fol. 169]

B.

A more serious claim of prejudice comes from the solicitor's reading from Loyd's purported confession.

An accomplice's confession given after the res gestae is not admissible against an accused before a petty jury. There must be confrontation face to face to allow viva voce cross-examination before the jury. *Connelly v. State*, supra; *Patterson v. State*, 202 Ala. 65, 79 So. 459; *Gore v. State*, 58 Ala. 391; Wharton, Criminal Evidence (12th Ed.), §§ 437-38. See *Hunter v. State*, 112 Ala. 77, 21 So. 65; also *McAnally v. State*, 74 Ala. 9.

In the instant case the purported written confession of the accomplice, Loyd, was used by the solicitor in cross examining Loyd after Loyd's being declared a hostile witness. The confession was put to Loyd in twenty-one consecutive fragments by questions such as:

"Q. 'I, Olen Ray Loyd, make the following statement of my own free will, voluntarily and without any threats or hope of reward to Ralph Holmes, whom I know to be a state investigator, Sheriff James G. Clark of Dallas County, Alabama.' Did you make that statement and sign it? A. I refuse to answer on the immunity of the laws of the State of Alabama and my constitutional rights.

"Q. I further ask you, didn't you say, 'I have been informed that I do not have to make any statement unless I desire to do so, that any statement I do make can be used * * *'"

The twentieth and twenty-first questions imply that the series made a complete document:

"Q. And then in your own handwriting did you say, 'I, Olen Ray Loyd, have had above read to me, consisting of ten pages which I have initialed, and they are true and correct to the best of my knowledge.' And signed your name, 'Olen Ray Loyd'. Is that true? A. I refuse to answer under the laws of Alabama and my constitutional rights.

"Q. Then down below your name it was signed, 'Witnessed by Ralph Holmes, investigator for the Department of Public Safety of the State of Alabama', and [fol. 170] under his name, 'James G. Clark, Sheriff, Dallas County, Alabama', and under his name, 'R. W. Godwin'. Was that done in your presence? A. I refuse to answer under the laws of Alabama and my constitutional rights."

In *Willingham v. State*, 261 Ala. 454, 74 So. 2d 241, per Simpson, J., at p. 459, we read:

"• • • the appellant complains of the action of the trial court in permitting the State to show a written statement to the State's witness and asking the witness if that was her handwriting, if she had signed it in the Solicitor's office and if she didn't say that James Willingham struck at the Brown boy. As to the latter question, the appellant objected and made a motion for a mistrial. The court in one ruling overruled same. The appellant argues that the State was attempting to impeach its own witness. In *Louisville & N. R. R. Co. v. Hurt*, 101 Ala. 34, 13 So. 130, the court permitted the plaintiff to ask his own witness if he had not testified on a former trial in a certain manner. It was there held that it is a matter wholly within the discretion of the court to permit a party to refresh the memory of a witness. The court pointed out that was frequently and properly done by showing the witness a memorandum, and by calling the attention of the witness to a particular statement. The same situation obtains here and we find no reversible error in this action of the trial court."

We distinguish the instant means from that found bad in *Kissic v. State*, 266 Ala. 71, 94 So. 2d 202. The opinion there plainly refuses to hold putting an impeaching transcription in evidence to be erroneous. The reversible error was playing the record before the jury (at p. 76):

"• • • We are not to be understood to hold that this latter admission into evidence was erroneous. The

error was in the *playing of the record* in the presence of the jury when it contained illegal hearsay evidence and prejudicial statements. To permit either the state or the defendant to play records previously made of complete conversations with witnesses under the pretext of refreshing their recollection, would open the door to putting evidence before the jury which could never be admitted under the established rules of evidence, * * * " (Italics added.)

Thereafter a State witness was recalled. The record shows:

[fol. 171]

"W. R. JONES, recalled to the stand, testified further as follows:

"Direct examination by Mr. McLeod:

"Q. Major Jones, I show you a paper here that is marked for identification purposes as Plaintiff's Exhibit No. 1, and ask you do you recognize that? A. Yes, I do.

"Q. And on the night of January 20, 1962, were you present in the Dallas County jail? A. Yes, I was.

"Q. I will ask you if you are the same Major Jones who was on the stand previously? A. Yes, sir.

"Q. And who was present when Olen Loyd signed that? A. Lt. Ralph Holmes, and Mr. Bob Godwin, and Sheriff Clark, and FBI Agent Frye, and yourself—Bob Frye of the FBI.

"Q. Did you see him sign it? A. Yes, and Mr. Finley was present too.

"Mr. McLeod: Your witness.

"Mr. Esco: Did you introduce that instrument?

"Mr. McLeod: No, I didn't introduce it. I just had it marked for identification purposes.

"Mr. Esco: Let the record show, if you will, that the solicitor questioned as to State's Exhibit No. 1, and we move to exclude on the grounds that the document is based purely on hearsay.

"The Court: Motion is denied.

"Mr. Esco: We except, if you please."

The same proof was made by the testimony of Lt. Ralph Holmes, a State investigator, and also by that of an agent of the Federal Bureau of Investigation. The defense did not object to any of the questions to these witnesses. Defense counsel did move to exclude Lt. Holmes's testimony. This, however, came at the close of his examination in chief.

Whatever grounds of objection might have been apt as to the never-introduced Exhibit 1, we need not speculate. The failure to object before an answer is made lets the evidence [fol. 172] come in. Overruling a motion to exclude such answers is not reversible error.* *Green v. State*, 271 Ala. 106, 122 So. 2d 520.

Judge McElroy, in *The Law of Evidence in Alabama* (2d Ed.), Vol. 1, § 165.01(e), p. 391:

"It has been said that a party 'may remind' his own witness of a previous inconsistent statement by him, for the purpose of refreshing his recollection, e. g., 'by reminding the witness of his testimony before the grand jury' (*Glenn v. State*, 157 Ala 12, 47 So 1034) or by 'reminding the witness of his testimony on the former trial'. (*Woodard v. State*, 253 Ala 259, 44 So2d 241, syl 13).

"The quoted statements of the Supreme Court do not mean that counsel can properly state in the presence of the jury that the witness testified to certain things before the grand jury or on a former trial. Although a party for the purpose of showing his surprise or of refreshing his own witness' recollection, may ask the witness whether he gave certain testimony on the prior occasion it is decidedly improper for counsel to declare

* *Jackson v. State*, 260 Ala. 641, 71 So. 2d 825, which construes § 10 of the Act of June 24, 1943, for automatic appeals from death sentences, is not pertinent. This section is the only provision under the Plain Error doctrine of which we are aware in Alabama criminal appellate review. That the section sets up one rule of review for capital convictions and another for other cases is beyond the jurisdiction of this court.

that the witness in fact gave such testimony (*Kirkpatrick v. State*, 18 Ala App 389, 92 So 238, syl 1)—for the reason that counsel himself would, in effect, be giving testimony."

The *Kirkpatrick* opinion rests on *Billingslea v. State*, 85 Ala. 323, 5 So. 137, *Thompson v. State*, 99 Ala. 173, 13 So. 753, and *Mayfield's Dig.* 880.

In the second paragraph of the *Billingslea* opinion, Stone, C. J., points out that in the absence of an answer, the bill of exceptions "was not enough to raise the question." In *Thompson* the witness "had just stated, that he did not remember how many times he had been to Edmund Stegars' house." The solicitor then asked him questions from a memorandum of his testimony before the grand jury.

[fol. 173] We do not understand that there is any contention that the solicitor attempted to use Loyd's written confession for any purpose—at least in examining Loyd—other than to jog his memory. Refreshing Loyd's memory was permissible because of his claiming not to know, not being sure and the like.

After the solicitor read portions to him and Loyd began claiming immunity from self-incrimination throughout the twenty-one questions, Douglas's counsel stopped objecting.

In this state of the record, even though it might be claimed that the repeated and cumulative use of the confession might have been an indirect mode of getting the inadmissible confession in evidence, yet the failure to object was waiver. There must be a ruling sought and acted on before the trial judge can be put in error. Here there was no ruling asked or invoked as to the questions embracing the alleged confession.

VII.

Arraignment

Douglas's contention that he was never arraigned is unsupported by any fact in or out of the record. He filed a motion for new trial. From the order denying it, it appears that the motion was submitted on the trial transcript without other proof being adduced.

The case of *Hamilton v. Alabama*, 368 U. S. 52 [see 273 Ala. 504, 142 So. 2d 868], was a *coram nobis* proceeding. The opinion on appeal, 270 Ala. 184, at 188 (cert. den. 363 U. S. 852), shows an unsuccessful collateral attack on the record judgment by use of bench notes.

Here we have only an *ipse dixit* to contradict the record. The record shows arraignment.

[fol. 174]

VIII.

Sufficiency of the Evidence

Regarding the sufficiency of the evidence, we start with no dispute as to the *corpus delicti* being shown.

The agency of Douglas's committing (or aiding and abetting Loyd in committing) the assault by shotgun on Warren must rest on circumstantial evidence.

We consider the record shows sufficient evidence to support the verdict and the judgment on it. We refer particularly to the following:

- 1) The finding in the cab of the truck of a plastic wad from a "Peters" shot gun shell.
- 2) The testimony of Warren and Gorff as to the 1959 White Ford with one burned-out tail light seen by them on Highway 5 shortly before the shooting.
- 3) The car's bearing Jefferson County tags (i. e., with "1A" prefix) at one time, and Etowah County tags ("31") at another.
- 4) The testimony of Mr. Williamson as to his seeing Loyd and Douglas in a 1959 White Ford with one burned out tail light with a shot gun and shells at the road block.
- 5) The evidence of Loyd and Douglas being in the car at Ohatchee.
- 6) The various guns (e. g., rifle in front grill) in car.
- 7) "Peters" OO magnum shells found in car.
- 8) Possession of two sets of license plates.

[fol. 175] 9) The nine and a half mile roadside search on Highway 5 leading to the finding of the shell—Exhibit 2.

10) Finley's testimony, particularly as to

(a) connection of shell and shotgun;

(b) distance of shot from truck (permitting inference which would exclude roadside pedestrian's firing); and

(c) identification of plastic wad.

Remoteness of time and also of place from the *res gestae* is a matter left to the jury if there is other relevance in a circumstance. *Busbee v. State*, 36 Ala. App. 701, 63 So. 2d 290; *Petty v. State*, 40 Ala. App. 151, 110 So. 2d 319; *Dortch v. State*, 40 Ala. App. 475, 115 So. 2d 287; *Pitts v. State*, 40 Ala. App. 702, 122 So. 2d 542. See also *Mott v. State*, 40 Ala. App. 144, 109 So. 2d 309, and *McElroy, Evidence* (2d Ed.), Vol. 1, § 21.01(3), pp. 16-17.

The circumstance of an accused's fleeing is admissible as an admission.

Thus, in *Goforth v. State*, 183 Ala. 66, 63 So. 8, there were two men indicted for the murder of Nicholas Shintzen. The opinion refers approvingly to proof of various efforts (such as leaving trains at unusual places, using assumed names, etc.) bearing on whether the accused were *fugitives from justice*.

In *Crenshaw v. State*, 225 Ala. 346, 142 So. 669, the defendant tried a disguise and gave another name. Bouldin, J., characterized this ruse as "admissible on the same principle as evidence of flight."

[fol. 176]. We consider evidence of the change of license plates between the scene of the shooting and the roadblock at Woodstock was relevant to show a wish to escape detection.

We have reviewed the entire record and consider the judgment of the circuit court should be

AFFIRMED.

[fol. 177]

IN THE COURT OF APPEALS OF ALABAMA

APPLICATION FOR REHEARING—October 23, 1963

Jesse Elliott Douglas, the appellant in this cause, shows unto the Court that on October 8, 1963, an order was entered in this court denying a motion filed by the appellant in this case and a judgment was entered affirming the judgment of the Circuit Court.

Appellant prays that this court will rehear and reconsider its ruling on said motion and judgment of affirmance and upon said rehearing and reconsideration enter orders sustaining said motion and reversing the judgment of the Circuit Court.

Bryan Chancey, Charles Cleveland, Attorneys for
Applicant.

November 12, 1963

It is ordered that the application for rehearing be and the same is hereby overruled.

Per Curiam

[fol. 178] [File endorsement omitted]

IN THE SUPREME COURT OF ALABAMA

SECOND DIVISION

No. ..

JOHN ELLIOTT DOUGLAS, Petitioner,

vs.

STATE OF ALABAMA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS

Filed November 27, 1963

Appealed From the Circuit Court
of Dallas County, Alabama

Case No. ..

Court of Appeals—Second Division

No. 61

Bryan Chancey, Gordon and Cleveland, 321 Massey Bldg.,
Birmingham 3, Alabama.

November 27, 1963, Submitted on Briefs

March 26, 1964, Writ Denied—No opinion

April 2, 1964, Application for Rehearing filed

April 30, 1964, Application for Rehearing Overruled

[fol. 179]

Petition for Certiorari to Court of Appeals

To the Honorable Chief Justice and Associate Justices of
the Supreme Court of Alabama:

Petitioner, Jesse Elliott Douglas, the appellant in the Court of Appeals and defendant in the Circuit Court of Dallas County, Alabama, through his attorneys, Bryan Chancey and Charles Cleveland, respectfully petitions this Honorable Court to review, revise, and reverse the judgment of affirmance rendered by the Court of Appeals of Alabama on October 8, 1963, concerning which judgment petitioner made application for rehearing to said Court of Appeals within the time required by law and which rehearing was refused; with opinion modified on November 12, 1963.

Petitioner further moves this Court to recall the Certificate of Affirmance of the Court of Appeals of Alabama, dated November 12, 1963.

Petitioner further shows unto the Court that the Court of Appeals erred in affirming and failing to reverse said cause, in the following ways, to-wit:

1. The Court erred in denying appellant's motion to strike portions of the transcript of the record.
2. The Court erred in denying appellant's motion for discharge.
3. The Court erred in its holding that the Code of Alabama, Title 30, Section 86, permits a grand jury to indict on hearsay testimony alone.
4. The Court erred in its holding that the defendant could not inquire into the legality of the evidence submitted to the grand jury.
5. The Court erred in holding that there was no prejudicial error in the reading of an alleged accomplice's confession to the jury by the solicitor.
6. The Court erred in holding that the defendant waived error in the reading of Loyd's alleged confession to the jury by the solicitor.
7. The court erred in holding that the calling of an alleged accomplice to the witness stand for the sole purpose of wringing from him a refusal to testify was not prejudicial error.

8. The court erred in the finding that the defendant's contention that he was never arraigned is not supported in the record and in not reversing the case because of the failure to arraign the defendant.

9. The court erred in holding that the exhibits which were illegally seized from Mr. Loyd's automobile were admissible in evidence against Mr. Douglas.

10. The court erred in holding that there was sufficient evidence to support the verdict.

Wherefore, your petitioner most respectfully prays that a Writ of Certiorari be issued out of this court and under its seal to the Court of Appeals of Alabama, directing that it send to this Court a full and complete transcript of the record and all proceedings of said Court of Appeals in this cause numbered and entitled aforesaid, to the end that this cause may be reviewed and determined by this Honorable Court as provided by law and the rules of practice and that an order directing the Court of Appeals after review by this Supreme Court to correct the errors complained of and reverse and revise the judgment of the Circuit Court of Dallas County, Alabama, or reverse the judgment of the Court of Appeals and set that Order of Affirmance aside and render in this Court an order and judgment discharging this applicant from further custody or render such judgment [fol. 181] as that Court of Appeals of Alabama should have rendered.

Petitioner prays that this court suggest and require the Court of Appeals to stay or recall its certificate of judgment of affirmance or that this Court recall same during the pendency of this application.

Submitted herewith and as a part of this Application is a brief in support hereof.

Charles Cleveland, Bryan Chancey, Attorneys for
Applicant-Petitioner.

Petitioner request an oral argument.

Charles Cleveland

Certificate of service (omitted in printing).

[fol. 182]

IN THE SUPREME COURT OF ALABAMA

The Court Met Pursuant to Adjournment

Present: All the Justices.

Sitting: Simpson's Division

2nd Div. 454

Ex Parte: Jesse Elliott Douglas.

Petition for Writ of Certiorari to the Court of Appeals

(In re: Jesse Elliott Douglas v. State of Alabama)

Dallas Circuit Court

ORDER DENYING PETITION—March 26, 1964

Come the parties by attorneys and the Petition for Writ of Certiorari to the Court of Appeals being submitted on briefs and duly examined and understood by the Court, it is considered and ordered that the Writ be and the same is hereby denied and the petition dismissed at the cost of the petitioner, for which costs let execution issue accordingly.

No Opinion

Livingston, C.J., Simpson, Merrill and Harwood, JJ., concur.

[fol. 183]

IN THE SUPREME COURT OF ALABAMA

APPLICATION FOR REHEARING ON PETITION FOR
WRIT OF CERTIORARI TO COURT OF APPEALS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Alabama:

Comes, Jesse Elliott Douglas, petitioner in the above styled cause, and moves this honorable court to grant unto him a rehearing in said cause and to reverse, revise and hold for naught its judgment rendered on, to-wit: the 26th day of March, 1964, which is to the effect that "The Supreme Court today denied writ of certiorari to the Court of Appeals. No opinion was written." The said Jesse Elliott Douglas respectfully petitions this honorable court to enter an order reversing said judgment as above set out.

Petitioner further moves this honorable court to recall the Certificate of Affirmance of the Court of Appeals, dated November 12, 1963.

All the specifications of error listed in the petition for writ of certiorari to the Court of Appeals are hereby adopted as grounds for this application for a rehearing.

In addition, petitioner respectfully requests this honorable court to furnish the said petitioner with a written opinion of its findings in connection with the questions of law and fact which were raised, briefed, and argued in his application for certiorari.

Petitioner prays that this court suggest and require the court of appeals to stay or recall its Certificate of judgment of Affirmance or that the court recall same during the pendency of this application for rehearing.

Submitted herewith and as a part of this application for rehearing is a brief and argument in support thereof.

Respectfully submitted,

Charles Cleveland, Bryan Chancey, Attorneys for
Applicant.

[fol. 184]

IN THE SUPREME COURT OF ALABAMA

The Court Met Pursuant to Adjournment

Present: All the Justices

2nd Div. 453

Ex Parte: Jesse Elliott Douglas

Petition for Writ of Certiorari to Court of Appeals

(In re: Jesse Elliott Douglas v. State of Alabama)

Dallas Circuit Court No. 9392

ORDER OVERRULING APPLICATION FOR REHEARING—
April 30, 1964

It Is Ordered that the application for rehearing filed on April 2, 1964, in the above styled cause be and the same is hereby overruled.

No Opinion Written on Rehearing

[fol. 185] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 187]

SUPREME COURT OF THE UNITED STATES

No. 313, October Term, 1964

JESSE ELLIOTT DOUGLAS, Petitioner,

vs.

ALABAMA.

ORDER ALLOWING CERTIORARI—October 12, 1964

The petition herein for a writ of certiorari to the Court of Appeals of the State of Alabama is granted limited to Question 1 presented by the petition which reads as follows:

"1. Is the defendant in a criminal trial deprived of due process of law when the prosecutor knowingly calls an alleged accomplice to the stand to secure from him a refusal to testify and when his presence on the stand is used as a pretense for reading to the jury an alleged confession of the witness which is inadmissible against the defendant?"

The case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LITERACY
SUPPLY COMPANY, U.S.

Office-Supreme Court, U.S.

FILED

JUL 22 1964

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

No. **313**

JESSE ELLIOTT DOUGLAS, Petitioner

v.

STATE OF ALABAMA, Respondent

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF ALABAMA**

BRYAN A. CHANCEY
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CHARLES CLEVELAND

15th Floor Empire Building
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Attorneys for Petitioner

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FILED

JUL 22 1964

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

No. 318

JESSE ELLIOTT DOUGLAS, Petitioner

v.

STATE OF ALABAMA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF ALABAMA

BRYAN A. CHANCEY
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IN THE

Supreme Court of the United States

No.

JESSE ELLIOTT DOUGLAS, *Petitioner*

v.

STATE OF ALABAMA, *Respondent*

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF ALABAMA**

Petitioner Jesse Elliott Douglas prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Alabama, affirming the judgment of the Circuit Court of Dallas County, Alabama, convicting petitioner of the crime of assault with intent to murder.

OPINION BELOW

The opinion of the Alabama Court of Appeals is reported at 163 So.2d 477, and is set out in full in the Appendix. The Supreme Court of Alabama denied certiorari without opinion. Its order is reported at 163 So.2d 496.

JURISDICTION

The judgment of the Alabama Court of Appeals was rendered on October 8, 1963. Application for rehearing was filed on October 23, 1963, and overruled without

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opinion on November 12, 1963. A petition to the Supreme Court of Alabama for a writ of certiorari to the Alabama Court of Appeals was filed on November 27, 1963. The Supreme Court of Alabama denied the writ without opinion on March 26, 1964, and denied the application for rehearing, also without opinion, on April 30, 1964. As petitioner claims he has been deprived of his rights under the Constitution of the United States, jurisdiction of this Court is invoked under 28 U.S.C. 1257 (c).

QUESTIONS PRESENTED FOR REVIEW

1. Is the defendant in a criminal trial deprived of due process of law when the prosecutor knowingly calls an alleged accomplice to the stand to secure from him a refusal to testify and when his presence on the stand is used as a pretense for reading to the jury an alleged confession of the witness which is inadmissible against the defendant?
2. Is the defendant who has appealed his conviction in a state court constitutionally entitled to some procedure for the correction of a erroneous transcript of the record?

STATEMENT OF THE CASE

Introduction

On January 18, 1962, Charles Layman Warren was driving a truck in a southernly direction on highway 5 near its intersection with highway 80 in Dallas County, Alabama. (R.50). About 2:30 A.M. a white Ford automobile with the right tail light out and with a Jefferson County tag passed him going in the same direction. (R. 51, 60). Mr. Warren was shot a few minutes later as an unidentified automobile passed him traveling in the opposite direction. (R. 60).

About 5:00 A.M. a highway patrolman stopped and searched a white Ford automobile driven by Olen Ray Loyd in which the defendant was a passenger at highway 5 and 11 in Bibb County, Alabama. (R. 63). Loyd and defendant were traveling from the direction of Tuscaloosa and when released, proceeded south on highway 5 toward the scene of the shooting. (R. 64).

Later, about 8:00 A.M. they were arrested by a policeman in Ohatchee, Alabama. (R. 69); He also searched the car and turned it, together with the defendant and Loyd over to the highway patrol. (R. 70). They were subsequently turned over to the Dallas County authorities and indicted for assault with intent to murder Mr. Warren. (R. 1, 72).

**The Prosecutor Called Loyd To The Stand
And Read His Confession To The Jury:**

During the trial the state called Loyd as a witness. (R. 79). Loyd had been convicted the previous day of the same charge. (R. 88). The portion of the transcript recording what occurred while Loyd was on the witness stand and the testimony of W. R. Jones, Lt. Ralph H. Holmes, and Robert L. Frye, relative to his confession, (R. 79-91), is set out in the Appendix beginning at page 49.

Objection by the defendant's attorney, who was also Loyd's attorney, to Loyd being called to the stand was overruled by the court. (R. 79). In response to questions by the prosecutor Loyd gave his name and stated he lived in Gadsden, Alabama. (R. 80). He invoked his constitutional rights and refused to answer questions relating to his arrest in Ohatchee, Alabama. (R. 80).

The court instructed Loyd to answer and when he refused to answer questions relating to his arrest and in-

carceration in jail, told him he was in contempt of court. (R. 80). The court overruled defendant's motion to exclude the witness from the stand, granted the state's request that he be declared a hostile witness and gave the state the right to cross-examine Loyd. (R. 81).

At this point the following occurred (R. 81):

"Q. I will ask if you on January 20, 1962 - - - .

Mr. Esco: (Interrupting) If your Honor please, I object to the reading of any document or proputed confession. - - -

Mr. McLeod: (Interrupting) This is cross-examination.

The Court: Hostile witness, Overrule.

Mr. Esco: We except, if you please.

Q. I will ask you if on the night of January 20, 1962, in Selma, Alabama, in the Dallas County Jail if you didn't make the following statement: (reading) 'I, Olen Ray Loyd, make the - - - '.

Mr. Esco: (Interrupting) I object to this being read in the presence of the jury.

Mr. McLeod: You've already got an objection in there.

Mr. Esco: I object to this being read in the presence of the jury.

The Court: Overrule.

Mr. Esco: We except."

The solicitor then proceeded to read the proputed confession of Loyd's to him in front of the jury. After each paragraph he paused and asked Mr. Loyd if he had made that statement. In each instance Mr. Loyd refused to answer

and invoked his constitutional rights. The statement covered nearly five pages in the transcript and implicated the defendant as having participated in the shooting of Warren with Loyd. (R. 80-86).

After the reading of the confession the defendant moved to exclude the confession from evidence and for a mistrial. Both motions were overruled. (R. 86). The court instructed the solicitor to prepare a contempt citation against Loyd for his refusal to answer the questions and advised him he would remain in jail "Just so long as he remained obdurate." (R. 87).

The jury was excused and the court adjudicated the witness guilty on the verdict of the jury rendered against him on the preceding day, sentenced him to twenty years imprisonment and set his appeal bond at \$50,000.00.⁽¹⁾ (R. 88). When the jury returned the defendant made another motion for a mistrial, which was overruled. (R. 88).

Motion To Correct The Transcript Of Record:

When the transcript of the record was filed with the Court of Appeals on September 4, 1962, it contained a recitation of an arraignment and a judgment adjudicating defendant guilty, although the defendant was not arraigned before trial and no judgment had been entered on the records of the circuit court. (R. 6, 7, 143). On September 21, 1962, the defendant filed a motion in the Alabama Court of Appeals, verified by defendant's attorney who had personally examined the circuit court's records, to strike the portions of the transcript that were not in accordance with the circuit court's records. (R. Supp. 1). The defendant also moved for his discharge, on the ground

⁽¹⁾The Alabama Supreme Court reduced the amount of the bond to \$7,500.

there was no valid judgment justifying his detention. As alternatives he moved the court to allow the issuance of a writ of certiorari to perfect the record, a writ of mandamus to the circuit judge and clerk directing them to file a corrected transcript, nunc pro tunc proceedings to establish a corrected record, and such other relief as may be appropriate. (R. Supp. 3, 4).

Defendant's motions were submitted on briefs and oral argument, but no evidence was allowed.⁽¹⁾ The defendant contended in his brief that the clerk must prepare the transcript exactly in accordance with her records and the appellate courts have power to do whatever is necessary to correct an erroneous transcript. The state contended that in the absence of fraud the transcript as certified by the clerk was conclusively presumed to be correct. The Alabama Court of Appeals denied all of defendant's motions.

REASONS FOR ALLOWANCE OF WRIT

1. The Defendant In A Criminal Trial Is Deprived Of Due Process Of Law When The Prosecutor Knowingly Calls An Alleged Accomplice To The Stand To Secure From Him A Refusal To Testify And When His Presence On The Stand Is Used As A Pretense For Reading To The Jury An Alleged Confession Of The Witness Which Is Inadmissible Against The Defendant.

This court has never ruled on the constitutionality of a prosecutor knowingly calling an accomplice to the stand for the purpose of wringing from him a refusal to testify. The issue was raised as a matter of evidence in federal cases in *Namet v. United States*, 373 U.S. 179. See also,

⁽¹⁾The trial judge was present at the hearing and admitted there was no written judgment and no record of arraignment in the circuit court records.

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Fletcher v. United States, (U.S. App. D. C. No. 18,233, April 30, 1964).

Justice Cates, in the opinion for the Alabama Court of Appeals, dismissed petitioner's contentions on this issue with the following language:

"Douglas can take nothing from the ruling of the court on Loyd's claim of immunity from self-incrimination. The privilege is personal. Had Loyd waived it, Douglas would have been confronted with testimony legal to use against him. *Beauvoir Club v. State*, 148 Ala. 643, 42 So. 1040; 8 Wigmore, Evidence (McNaughton rev. 1961), §2259." (R. 168).

The Alabama court merely evaded the issue. While it is true that Loyd could have waived his immunity and testified, he did not. The prosecutor knew he would not testify and called him to the stand for the prejudicial effect his refusal to testify would have on the jury. This deprived the defendant of a fair trial and due process of law.

In *Kaplow v. State*, 157 So.2d. 862, (Fla.), the court held that the defendant was deprived of a fair trial when the state called an alleged accomplice to the stand, knowing he would refuse to testify. The court, quoting from Annotation, 86 A.L.R.2d 1443, listed the circumstances requiring a reversal as follows:

" . . . (1) that the witness appears to have been so closely implicated in the defendant's alleged criminal activities that the invocation by the witness of a claim of privilege when asked a relevant question tending to establish the offense charged will create an inference of the witness' complicity, which will, in turn, prejudice the defendant in the eyes of the jury; (2) that the prosecutor knew in advance or had reason to anticipate that the witness would claim

his privilege, or had no reasonable basis for expecting him to waive it, and, therefore, called him in bad faith and for an improper purpose; (3) that the witness had a right to invoke his privilege; (4) that the defense counsel made timely objection and took exception to the prosecutor's misconduct; and (5) that the trial court refused or failed to cure the error by an appropriate instruction or admonition to the jury."

The record clearly shows that each of the listed circumstances is present in this case. (1) The witness was an alleged accomplice in the crime for which both he and the defendant were charged. (2) Loyd had repudiated his confession and had refused to testify on his own behalf the previous day. (3) The witness had been convicted by a jury verdict and given notice of appeal: Judgment was rendered against him during a recess after he refused to testify. Although the trial court ordered him to testify, he clearly had the right to refuse, *Malloy v. Hogan*, 84 S. Ct. 1489, (4) The defendant's attorney objected to the witness taking the stand as soon as the prosecutor called him. (5) The trial court not only failed to give the jury appropriate instructions, but by his rulings and comments gave the jury reason to assume the refusal of the witness to testify should be used against the defendant.

The reasons for reversal discussed in *Namet* were (1) prosecutorial misconduct and (2) the addition of critical weight to the state's case in a form not subject to cross examination.

The motives of the prosecutor is clearly shown in the record. In addition to achieving the maximum prejudicial effect by the refusal of Loyd to testify, the prosecutor attempted to brow-beat him and by threat of contempt of

court, force him to testify. Also, Loyd's presence on the stand was used by the prosecutor as a vehicle for reading his confession to the jury. The prosecutor knew Loyd's confession was not admissible against the defendant and did not even offer it in evidence.

The Alabama Court of Appeals held that Loyd's confession was not admissible; "There must be confrontation against an accused to allow *viva voce* cross-examination before the jury." (R. 169). However, Judge Cates reasoned:

"After the solicitor read portions to him and Loyd began claiming immunity from self-incrimination throughout the twenty-one questions, Douglas's counsel stopped objecting.

"In this state of the record, even though it might be claimed that the repeated and cumulative use of the confession might have been an indirect mode of getting the inadmissible confession in evidence, yet the failure to object was waiver. There must be a ruling sought and acted on before the trial judge can be put in error. Here there was no ruling asked or invoked as to the questions embracing the alleged confession." (R. 173).

The holding of a waiver based on failure to object is not supported by the record. The record clearly shows the defendant made three objections to the reading of the confession before it was read and was overruled each time. (R. 81). It was only when the prosecutor conceded adequate reservation of error that the defendant's attorney stopped objecting. (R. 81). This court has a duty to make its own independent examination of the record to protect against deprivations of the constitution. *Napue v. Illinois*, 360 U.S. 264.

In *Napue v. Illinois*, supra, the Court held that the state cannot use, or allow to go uncorrected, testimony which its representatives know to be false. The suppression of a confession of an accomplice by the state was held to violate due process in *Brady v. Maryland*, 373 U.S. 83. See also, *Powell v. Wimar*, 287 F.2d. 275 (5th Cir.).

The knowing use of inadmissible evidence to obtain a prejudicial verdict effectively deprives the defendant of the rudimentary demands of justice. There is no valid distinction between the use of false evidence and evidence which public policy says should not be used. In either event the prosecutor is playing on the prejudice of the jury and the defendant is denied the right of cross-examination.

In *Anderson v. United States*, 318 U.S. 350, the Court held that the use of inadmissible confessions in a conspiracy case constituted grounds for reversal, even for those defendants against whom they were not admitted. Loyd contends that his confession was illegally obtained and not admissible against him. At the time Loyd confessed, he was deprived of the right to consult with his attorney, who was on the premises of the jail attempting to see him. *Escabedo v. Illinois*, U.S. (decided 6-22-64). If in light of *Escabedo* and *Massiah v. United States*, 84 S. Ct. 1199, his confession is held to be inadmissible against him, it would be a travesty of justice to allow another to be convicted on it.

The implications drawn by the jury from the spectacle of seeing Loyd refuse to testify and the details of the confession were beyond effective cross examination. To say that they added critical weight to the state's case is an understatement. The state depended heavily on the confession. In the narration of facts in the state's brief in the Alabama Court of Appeals the details of the confession

were recited as if they were in evidence. Except in the confession the defendant was named only as being a passenger in the car with Loyd on two occasions, both several hours after the shooting. He was not connected with any of the exhibits introduced by the state, except in the confession. Even Judge Cates referred to a change in license plates as evidence against the defendant, when it was not referred to anywhere in the record, except in the confession.

2. The Defendant Who HasAppealed His Conviction In A State Court Is Constitutionally Entitled To Some Procedure For The Correction Of An Erroneous Transcript Of The Record.

This Court has held that a state which provides for an appeal must provide an indigent with a transcript of the record, or an adequate substitute. *Griffin v. Illinois*, 351 U.S. 12, In *Chessman v. Teets*, 354 U.S. 156, the Court held that a transcript of the record was such an essential part of the judicial proceedings that the defendant had a constitutional right to be present or represented by counsel at proceedings to establish a disputed record.

It is inherent in these holdings that the defendant is entitled to a correct transcript. A necessary corollary is that he is entitled to some judicial proceeding to establish a disputed transcript.

Under Alabama Law an arraignment is a critical stage of criminal proceedings. *Hamilton v. Alabama*, 368 U.S. 52. A defendant is entitled to be discharged where there is no written judgment. *Gardner v. State*, 21 Ala. App. 388, 108 So. 635. Although the defendant was not arraigned and there was no judgment written on the records of the circuit court, defendant was denied the right to effectively raise these points by erroneous entries in the transcript of the record.

The defendant had no knowledge of these false entries until the transcript was filed on September 4, 1962. On September 21 he filed a motion to strike, a motion for his discharge, and various motions for alternative remedies to correct the transcript. In overruling the motions Justice Cates said:

"We consider that this motion is not well taken because the appellant has failed to allege or show that the quoted entry does not represent what actually transpired." (R. 146).

Of course, the failure to allege that the defendant was not orally adjudicated guilty is immaterial to his contention that the judgment must be reduced in writing. The defendant did contend that he was never arraigned.

The refusal of the Alabama courts to recognize any procedure to correct the erroneous transcript constitutes a denial of due process. A defendant cannot be constitutionally deprived of the right to question the legality of his conviction by manipulation of the transcript of the record. The state must provide some procedure for the correction of an erroneous transcript of the record.

CONCLUSION

Petitioner respectfully submits that his petition for a writ of certiorari to the Court of Appeals of Alabama should be granted.

Respectfully Submitted
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Attorneys for Petitioner

Opinion Of The Alabama Court Of Appeals

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

OCTOBER TERM, 1963-64

2 Div. 61

JESSE ELLIOTT DOUGLAS

v.

STATE

APPEAL FROM DALLAS CIRCUIT COURT

CATES, JUDGE

Appeal from conviction of guilt of assault with intent to murder, Code 1940, T. 14, § 38: sentence, twenty years imprisonment.

Pages 6 and 7 of the record show the following:

"VERDICT AND JUDGMENT. March 3, 1962

"Comes the State of Alabama, by its Solicitor, and also comes the Defendant, Jesse Elliott Douglas, in his own proper person and by and with his attorneys, and being duly and legally arraigned in open Court upon the indictment in this cause, for answer to said indictment, pleads and says that he is not guilty in manner and form as charged therein; and issue being joined:

"Thereupon came a jury of good and lawful men, towit: Albert S. Champion and eleven others, who having been impanelled and duly sworn according to law, on their oaths

say, 'We, the Jury, find the Defendant guilty of assault with the intent to murder as charged in the indictment.
Albert S. Champion, Foreman.'

"THE STATE OF ALABAMA,
Plaintiff
VERSUS
JESSE ELLIOTT DOUGLAS,
Defendant

In The Circuit Court of
Dallas County, Alabama
Case No. 9392

SENTENCE

March 3, 1962

"Directly the Court completed the poll of the jury, the defendant, Jesse Elliott Douglas, was called before the Court in the presence of his counsel and the following proceedings were had:

"The Court: Do you have anything to say why the judgment of the Court should not be pronounced against you at this time?

"The Defendant: No, sir.

"The Court: According to the verdict of the jury finding you guilty of assault with intent to murder, as charged in the indictment, you are accordingly adjudged to be guilty of assault with intent to murder as charged in the indictment, and as punishment for said offense you are sentenced to the penitentiary of Alabama for a period of twenty years.

"The Court: Is there notice of appeal?

"Mr. Esco: Yes, sir.

"The Court: The Court will set your appeal bond at \$50,000.00.

The undersigned, James A. Hare, as Presiding Judge in

the trial of the above styled cause in the Fourth Judicial Circuit of Alabama, does hereby certify that the proceedings above recited are true and correct as to sentence pronounced on the defendant, Jesse Elliott Douglas, in the Circuit Court of Dallas County, Selma, Alabama, on the 3rd day of March, 1962.

/s/ JAMES A. HARE
Presiding Judge"

Douglas moves this court to strike the portion of the transcript above quoted.

Douglas further prays that he be discharged—presumably on the ground that the above quoted matter is not a minute entry within the meaning of the statutes and rules governing the minutes of circuit courts. Code 1940, T. 7, §§ 1-5; T. 13, § 198, as amended (particularly subsec. 8).

We consider that this motion is not well taken because the appellant has failed to allege or show that the quoted entry does not represent what actually transpired.

Douglas does not allege that the foregoing entry is untrue. Hence, if we are to consider the appeal at all, we must accept this entry. There must be a judgment of conviction before there can be an appeal. Code 1940, T. 15, § 368; *Vick v. State*, 156 Ala. 669, 46 So. 566 (opinion in So. Rep. only); *Moss v. State*, 140 Ala. 199, 37 So. 156; *Ex parte Loyd*, Ala. , 155 So. 2d 519.

The tendencies of the evidence were:

William C. Smith, a physician and surgeon of Selma, Alabama, testified as follows:

"Q. S sometime during the day of January 18, 1962, did you have one Charles Layman Warren as a patient?

A. Yes.

"Q Where did you first see him, Doctor? A In the emergency room at the New Vaughan Memorial Hospital.

"Q Will you describe those injuries, Doctor? A He had injuries to his chest on the left side which apparently was caused by a gun shot of some sort.

"Mr. Esco: Now, if your Honor, please, he can answer the question, but a further description of the injuries is not responsive.

"The Court: Overrule.

"Mr. Esco: We except, if you please.

"Q Proceed. A Injuries caused a partial collapse of his lung on that side and also some bleeding inside of the chest. He had other minor injuries, nicks and cuts.

"Q Did you xray his body? A Yes, sir.

"Q Did the xrays show further injuries? A Well, they showed the injuries to his lung on the left side and other organs inside his chest, and there was bleeding in his chest.

"Q And did the xrays show any foreign matter in his chest? A Yes, there were several metallic fragments. Two of these were about a quarter of an inch in diameter, and some very small minute particles.

"Q Did you perform any minor or major surgery on him? A Yes, sir, I put a small tube into his chest to remove the air and blood that had accumulated, and to remove any more that might be there subsequently.

"Q Now, you said something about one of his lungs partially collapsing. Tell us about that, Doctor. A Well, the left lung was collapsed approximately 10% to 15% of its normal size. This apparently was caused by escapement of air from his lung into his chest.

"Q Doctor, from your experience as a doctor and from your observation of these injuries that you have just described, were they the type of injuries that could

have caused death? A Yes, I think they could have.

"Q Were they the type of injuries that cause grievous bodily harm? A Yes, they were serious injuries.

"Q How long did this man stay in the hospital, Doctor? A Twelve days."

Mr. Warren testified that early in the morning of January 18, 1962, he was driving a West Brothers truck pulling a Bowman Transportation trailer. He had left Birmingham for New Orleans via U. S. Highway 11 south to Woodstock, Alabama. There he turned off on Highway 5 to the south. As he got near the crossing of Highway 5 and U. S. 80 at Brown's in Dallas County:

"* * * * I met an on-coming car, and when it got even with me I heard a bam-bam, and I looked over to see if I could see what it was, and I saw the hole in the door and then I knew I was shot. I realized someone had shot me, and I got the truck stopped, and another driver who was with me helped me get across the road and lay down, and he stopped the next car and had them call the ambulance.

"Q Where did that shot come from? A It came from the car that I was meeting."

* * * * *

"Q Did you see a car that night? A Yes, sir.

"Q About the time you were shot? A You mean around the time I was shot?

"Q Yes. A About oh, I would say a few minutes before I was shot, there was a white '59 Ford passed me, and it was going the same way that I was going.

"Q And how long after that was it before you were shot? A It was a very short time. I couldn't give you

the exact minutes, but I'd say a few minutes — a matter of a few miles.

"Q Were you able to observe the automobile tag on that car? A The one that passed me?

"Q Yes. A *Yes, sir, it was a 1-A tag.* I didn't read the numbers on it." (Emphasis supplied.)

The State's second witness was Mr. Edward Gorff, who was also driving for West Brothers running some 65-70 yard behind Warren:

"Q And in what position were you and Mr. Warren traveling? A He was in front.

"Q And who was behind? A Warren was in front and I was in the truck following him.

"Q And did you attempt to pass him? A Well, I was fixing to pass him and stop and tell him let's eat before we got way down the road.

"Q And did something happen to prevent you from passing him? A Yes, sir. We met a car.

"Q Now, previous to that, had an automobile passed you going south? A Yes, sir.

"Q Did you get a look at that car? A Yes, sir.

"Q What color was it? A White.

"Q What make and model? A '59 Ford Galaxie.

"Q Did you observe the tail lights on that Ford? A Yes, sir.

¹The first number of an automobile license tag denotes county of the person who, on October 1 the beginning of the license year, is the registered owner, viz., "1" (including letter suffixes "A" and "B") for Jefferson, "2" for Mobile, "3" for Montgomery, then (in alphabetical order) "4" for Autauga, and so on through "67" for Winston. The prefix for Etowah County is 31.

"Q How many tail lights did he have? A Had one burning and one was burned out.

"Q Which one was burning and which one was burned out? A The right one was burned out and the left was shining.

"Q And had you gotten close to him—did you hear a shot that night? A Yes, sir.

"Q And had you gotten up close behind Warren when that happened? A Yes, sir.

"Q Approximately how close were you to him? A Approximately sixty-five or seventy yards.

"Q And just tell us what you saw and heard and observed there, just when you got to Highway 80. A We met this car. And I was fixing to pass him and I saw a car come over the hill and I fell back behind him. I was getting up close enough so I could stop him at the junction, and the car lights blinded me and I pulled back over to the right side of the road as far as I could to keep the lights from blinding me so I could see when he got around, and I heard this shot, and Warren put on brakes and pulled off to the side of the road. I was next, so I pulled off too, to see what was wrong.

"Q The car that was meeting you, do you know whether his lights were on bright or dim? A Well, four of them shining. I imagine they were on bright.

"Q And after you heard this shot, did that car have to come on then by you? A Yes.

"Q Did you look at it? A Well, I seen it was a white car is all I could tell, because the lights were on bright, and that's about all the time I had to see—close together.

"Q And you could tell what color it was? A Yes, sir.

"Q What color was it? A It was a white car.

* * * * *

"Q And when this car first passed you going south, did you observe the tag number? A Yes, sir.

"Q And what was the prefix on there? What county was it from? A Jefferson county.

* * * * *

"Q The next afternoon did you go to Anniston, Alabama, with Captain Thornton of the Alabama Highway Patrol? A Yes, sir.

"Q And where did he carry you?

"Mr. Esco: We object to all this. This is too remote from the scene. Not part of the res and has nothing to do with this case.

"The Court: Overrule at the present time.

"Mr. Esco: We except, if you please.

"Q Where did you go to in Anniston? A Highway Patrol office.

"Q Did you see an automobile there? A Yes, sir.

"Q Describe the automobile that you saw there.

"Mr. Esco: We object, your Honor. This is too remote from the scene of the res. The next afternoon, has nothing to do with this case whatsoever, what he saw the next afternoon some hundred miles or more away.

"The Court: Overrule.

"Mr. Esco: We except.

"Q Go ahead. A I saw a white '59 Galaxie Ford.

"Q Was that the same Ford you saw the night before?

"Mr. Esco: Your Honor please, we object.

"Q In your opinion.

"Mr. Esco: If he can identify it in some way. And we also object on the ground it is too remote.

"The Court: Overrule.

"Mr. Esco: We except.

"A I would say it was the same Ford. Only difference it had a different kind of tag on it, had an Etowah County tag on it."

About 5:00 A.M. January 18, Mr. J. S. Williamson, a State Highway Patrolman, was tending a road block some sixty miles north of Brown's Station at the junction of U. S. 11 and Alabama 5. A car came to the road block "from toward Tuscaloosa":

"Q When this automobile arrived at the intersection, which way did he go then? A Turned down Highway 5 on south.

"Q Did you stop him? A Yes, sir.

"Q Did you check his car? A Yes, sir.

"Q Who was driving that car? A Olen Loyd.

"Q Did you see Mr. Douglas in there? A Yes sir.

"Q Where was he sitting? A Sitting on the front seat with him.

"Q Did you check that car? A Yes, sir.

"Q Did you see anything in that car? A Yes, sir, I saw some clothing in the back seat.

"Q Did you check the trunk of that car? A Yes sir.

"Q What did you see there? A Well, I saw a shotgun case and shell box and two lights mounted on a board and some wires.

"Q How did you know—you say one of them was named Douglas. How did you know his name was Douglas? A Checked his Social Security card.

"Q You testified there were some shells back there, Did you ---

"Mr. Esco: We object to leading questions.

"Mr. McLeod: That's not a leading question, your Honor. That's not leading. I said, 'You testified - - - and then my question comes thereafter.'

"Q Did you testify awhile ago that you saw some shells? A I saw a shell box.

"Q Did you see what type of shells, what make? A The brand on them was Peters high velocity.

"Q Did you stop these men? I mean, did you hold them? A Well, we checked them for several minutes, yes sir.

"Q "What did you do then? A We wrote down the information and turned them loose."

"Q After that automobile drove off—well, first I'll ask you, which way did it go then? A It headed on south on Highway 5.

"Q As that car drove off, did you observe the back of it? A Yes, sir.

"Q Did you observe the tail lights? A Yes, sir.

"Q What was their condition? A One tail light was out.

"Q Which one? A I don't recall which one was out.

"Q What kind of car were they driving? A Driving a '59 white Ford.

"Q Did you later on see that car again? A Yes, sir.

"Q Where did you see it? A Over in Anniston.

"Q That same day? A Yes, sir.

"Q The car you saw in Anniston, was that the same car you saw at the intersection of Highways 5 and 11 that Mr. Douglas was in? A Yes, sir."

Loyd and Douglas were stopped in Ohatchee, Calhoun County. The policeman who stopped them searched the front of the car and found a shotgun. A pump gun was in the

trunk. Neither Loyd nor Douglas objected to being stopped nor to the search of the car.

Two State Highway Patrolmen and the city officer took Loyd, Douglas, and the white '59 Ford to the Highway Patrol station in Anniston.

W. R. Jones, an investigator, Department of Public Safety,² testified that he "carried" Douglas from Anniston to Birmingham. There Sheriff Clark of Dallas County arrested Douglas on a warrant. Jones also took the 1959 white Ford to Birmingham and had a Capt. Godwin drive it to Montgomery. There it was turned over to a member of the State Toxicologist's staff.

At Anniston, Jones had found in the car the following:

- (1) An automobile license tag for the license year expiring September 30, 1962, and bearing No. "1A-37506"—discovered under a floor mat;
- (2) a shotgun in the trunk;
- (3) another shotgun beneath the back seat; and
- (4) a rifle in the dust pan between the car's grill and radiator.

The State then called Olen Ray Loyd (defendant-appellant in *Loyd v. State*, 2 Div. 60). To all questions put him—except his name and address—he declined to answer.

Mr. L. C. Crocker, a deputy sheriff of Dallas County, testified that January 21, 1962, going north from the place of Warren's being shot, he searched some eight hours along the right of way of Highway 5 for some nine and

²This new arm of government to absorb and enlarge upon the old highway Patrol was created in 1953. Act No. 585, September 11, 1953.

one-half miles. At this point, he found an ejected shotgun shell lying about ten feet four inches from the margin of the paving. This shell came into evidence as State's Exhibit 2.

Mr. Crocker passed this empty shell to Mr. Robert B. Finley, a member of the State Toxicologist's staff.

Finley testified that:

- (1) He saw the empty shotgun shell (Exhibit 2) on the roadside where Mr. Crocker found it.
- (2) He saw, at a truck stop at Browns in Dallas County, the tractor truck which Warren was driving when he was shot.
- (3) He saw³, at the Highway Patrol headquarters in Montgomery, a white 1959 Ford car with a 1962 tag, 1A-37056, under the front seat.
- (4) He saw a Winchester shotgun in the rear seat of this car.
- (5) He saw a quantity of "Peters" 00 magnum load, 12-gauge shotgun shells in this car.
- (6) He saw a plastic wad in the tractor truck.
- (7) He took a similar wad from one of the "Peters" 00 magnum load 12-gauge shotgun shells which he found in the 1959 Ford.

"* * * Members of the state highway patrol when so authorized in writing by the governor shall have the power of peace officers in this state, * * *" Code 1940, T. 36, § 71. See *Roberts v. State*, 253 Ala. 565, 46 So. 2d 5.

³Photographs which Finley took show the car with Etowah County tags (31-27514).

(8) He had never seen any wadding of this type except in "Peters" 00 magnum load shells.

(9) He had fired a "Peters" 00 magnum load 12-gauge shotgun shell in the Winchester shotgun with the firing pin leaving a distinctive imprint "of a small defect" in the hull of the shell.

(10) He observed the hull found on the road (Exhibit 2) and the hull he test fired in the gun under a comparison microscope.

(11) In his opinion, both hulls had been fired from the Winchester shotgun.

(12) From shooting through cardboard, he was of the opinion that when fired the distance from the gun was "not greater than eight feet from the tractor."

Because of points in Douglas's brief, we set forth three excerpts from the evidence:

1. Testimony of Robert B. Finley (from p. 107):

"Q Mr. Finley, will you show that picture to the jury and explain it to them? A (The witness stands before the jury) On all fire arms there are markings that are true marks and which when a shell is fired in a particular weapon those marks are left on the shell. So we can take a questioned shell and a test shell which we fired from a weapon—in this case, a shotgun—and under a double microscope, each one under a separate microscope in which they are connected, enabling us to see a portion of each hull-at the same time. These markings, true markings that are on the weapon, are left on the hull when the shell is fired. If we are able to match up these markings where they will continue across the split image here (indicating)—in other words, this being the test round which I fired and this is the test hull which was found on the highway, if we are able to show a continuation of these markings that is indication that the

evidence hull was fired in the particular shotgun in question.

"Q Now, from your checking of that, are the markings similar? A Yes, sir.

"Q And from this test that you ran and other tests, are you of the opinion that the hull that you found on the highway, Highway No. 5, and the test hull were both fired from the same shotgun? A It is my opinion that they both were, that the hull found on Highway 5 was fired from this shotgun.

"Mr. Esco: If your Honor please, we move to exclude on the ground that this man has not been qualified as an expert in the field in which he is now testifying. We move to exclude his testimony.

"The Court: Overrule.

"Mr. Esco: We except, if you please."

2. Testimony of Robert B. Finley (from pp. 111-112):

"Q Mr. Finley, did you make some test shots to ascertain the distance, how far that would be, to make the hole that was made in that vehicle? A Yes.

"The Court: Just a moment. Do you want to take him on voir dire?

"Mr. Esco: I would like to read into the record that the solicitor is now demonstrating to this witness and before this jury a group of cardboard cards in which there are various holes, showing what I expect is a shotgun pattern, and which he is asking this witness about. We certainly object to the showing of those to the jury or any testimony concerning them. They are not the same material, metal, and there has been no proper predicate laid showing what conditions the tests were made in.

"The Court: Objection is overruled.

"Mr. Esco: We except; if you please.

"Q Mr. Finley, I will show you a cardboard marked for identification purposes as Plaintiff's Exhibit No. 37, and ask you do you recognize that? A Yes.

"Q And what do these holes in here represent? A That represents a pattern in which I fired from this Winchester shotgun at a distance of eight feet.

"Q Will you show that to the jury?

"Mr. Esco: If your Honor please, we object to it. It is not in evidence and we object. Let the record show he is showing a cardboard pattern with evidence shotgun holes in it to the jury. We object on the grounds that it is not a fair comparison of the thing to be tested against, which is metal, and he is showing cardboard here; and he has laid no predicate to show that this is a comparative metal or a comparative pattern that's been made. It is not a fair comparison.

"The Court: Overrule.

"Mr. Esco: We except.

"Q Is there any distinction in the pattern if it is shot into cardboard or if it is shot into metal?

"Mr. Esco: We object to his answering unless the predicate has been laid showing him to be an expert.*

*The learned trial judge correctly sustained objection to a question using the word "criminalist" to characterize Finley. We have found no statutory definition of "criminalist." Webster's 2nd International Dictionary: "Criminalist. 1. One versed in criminal law. 2. One addicted to criminality; also a psychiatrist dealing with criminality." Webster's Third New International Dictionary retains 1 but changes 2 to "2: a specialist in criminology."

In *P. V. Taylor*, 152 C. A. 2d 29, 312 P. 2d 731, the court's opinion implies that the word "criminalist" seems to have no single fixed meaning. Upon consideration of criticism leveled at Webster's Third, (e. g., *Saturday Review*, September 30, 1961, Vol. 44:19-20, November 10, 1962, Vol. 45:70; *Time*, October 6, 1961, Vol. 78:49—" * * * more a *Social Register* of words than a Supreme Court of language."); *Science*, November 10, 1961, Vol. 134:1493), we cannot accord it authority superior to that of the Second Edition. See *Adler v. State*, 55 Ala. 16; *Cook v. State*, 110 Ala. 40, 20 So. 360.

"Mr. McLeod: I qualified him.

"Q In your opinion are they similar when they are fired into cardboard or fired into metal? A Well, no, I believe in metal is somewhat of a different - -

"Mr. Esco: (Interrupting) We object. He has answered the question, he said no.

* * * * *

"Q Can you make a comparison by these tests that you were just testifying to? A I can use the test to form an opinion.

"Q And the opinion that you have formed, how far was the shotgun away from the tractor when it was fired into?

"Mr. Esco: We're going to object, your Honor, unless the proper predicate is shown to show how he knows what he knows, whether or not he is qualified as an expert, whether or not he under the same conditions has made a test in a speeding automobile against a speeding truck, of the same metal that was involved in the vehicle hit, same shell was used, same brand and type and size was used, and the same age shell as far as that's concerned,

"The Court: Overrule.

"Mr. Esco: Exception, if you please.

"Q Answer. Do you remember the question. A Will you read it, please?

"Court Reporter: (Reading from her note) 'And the opinion that you have formed, how far was the shotgun away from the tractor when it was fired into?'

"A It is my opinion that it was a distance *not greater than eight feet.*

"Mr. Esco: We move to exclude the testimony.

"The Court: Overrule." (Italics supplied.)

3. Testimony of Robert B. Finley (from pp. 114-115):

"Q Now Mr. Finley, this wadding that you said you removed from double '0' buckshot, during your four and a half years experience as a criminalist for the State of Alabama have you ever seen any wadding of this type except in Peters double '0' magnum load?

* * * * *

"A) No.

"Q Do you have available to you at the State Department of Toxicology's laboratory numerous shells that are manufactured in the United States? A Yes.

"Q And do you have—in the laboratory do you have shells of all types that you know of as being manufactured in the United States? A We have numerous shells but I don't know that we have one of every type.

"Q Is it every type that you know of? A Yes.

"Q Now, Mr. Finley, is this the only type of wadding that is used in a gun? A No.

"Q What other type is used? A A hair type of wadding.

* * * * *

"Q Were there other shells found in the car? A Yes.

"Q Were shells found in the ammo belt? A Yes, sir.

"Q Were there shells found in that Peters box in there? A Yes, sir.

"Q And was it a great many of them? A Yes, sir.

"Q Now, Mr. Finley, I will show you Plaintiff's Exhibit No. 10, and ask you do you recognize that? A Yes.

"Q I will show you Plaintiff's Exhibit No. 11, and ask you do you recognize that? A Yes.

"Q And where did you find that ammunition? A This, I found double '0' magnum load in this automobile; and this one, double '0' magnum, which I purchased myself."

Douglas adduced no evidence, and did not except to the oral charge. In brief, he makes no contention that the court erred in the refusal of any charge tendered by him in writing. Code 1940, T. 7, § 273.

Appellant's brief contends for the following propositions:

1. No legal evidence was before the grand jury, hence the court should have sustained defense motion to quash the indictment.
2. On hearing this motion, the court erred in excluding questions as to evidence before the grand jury.
3. "Evidence does (not) support a conviction of assault with intent to murder because the State's own evidence negates such an intent."
4. No predicate of substantially similar conditions was laid for evidence of out of court experiments.
5. Newspaper accounts prejudiced defendant, hence his motion to continue should have been granted.
6. Minutes are the only proof of judgments.
7. Offering inadmissible evidence before a trial jury ground for mistrial if the evidence is capable of provoking prejudice against the defendant.
8. "Arraignment is absolutely (sic) in Alabama."

I.

The Motion to Quash

We group here the first two of appellant's contentions: (A) as to there being no legal evidence before the accusing jury; and (B) the trial judge's excluding evidence sought from the grand jurors at the hearing on this motion to quash.

A. No Legal Evidence

The record before us (p. 4) shows a motion listing six grounds: (1) "not sufficient legal evidence"; (2) no "legal evidence" to establish corpus delicti; (3) "did not have competent witnesses or legal documentary evidence" before them; (4) no legal evidence to indict defendant; (5) indictment was based solely on a confession extorted from an alleged accomplice, Olen Ray Loyd; and (6) that Loyd's confession came from violation of the McNabb rule.⁵

The first witness called by the defense in aid of the motion was a grand juror. He testified that the only evidence before the grand jury was the testimony of the sheriff. Included in this was a written confession of Loyd which the sheriff read to the grand jury.

On cross (by the State) the grand juror's testimony was in part:

"Q Did Mr. Clark testify and tell you that a man had been shot out here on No. 5 highway by the name of Charles L. Warren? A Yes, sir. I'd already stated that.

"Q And did he testify to other facts involved in that crime? A Yes, sir.

⁵*McNabb v. United States*, 318 U. S. 332. See Busch & Harwood, Confessions, 22 Ala. Lawyer 272.

"Q - And did Sheriff Clark give the grand jury evidence that the defendant, Jesse Elliott Douglas, was involved in that shooting? A Yes, sir.

"Q And beside his testimony did he have a legal document before you? A He had a document, yes, sir."

On redirect the defendant's counsel summarized and had the witness adopt as follows:

"Q And Sheriff Clark, as the only witness appearing, told you that a man had been shot, that he had some evidence that was being examined by the toxicologist, and he had a purported confession. Is that all of the evidence that he had connecting Mr. Douglas with this crime? A That's all I can think of at this time."

Another juror was called and stated that the sheriff proffered a shotgun shell as well as the signed confession. Part of his examination in chief went:

"Q Did he bring you any direct evidence at all that a crime had been committed? A Well, we knew about that. Yes.

"Q How did you know, Mr. Coffee? A Well, we knew about the man in the hospital that had received the wound.

"Q How did you know about that? A Well, we was told about it.

"Q By whom? A Well, the sheriff, for one.

"Q Before the grand jury? A We knew that was the reason he didn't appear there.

"Q You were told by the sheriff about the man in the hospital? A Yes.

"Q And what were you told by the sheriff about him?

"Mr. McLeod: I object to that question.

"The Court: Sustain the objection.

"Mr. Esco: We except, if you please.

"Q Did you yourself observe the man in the hospital? A No.

"Q Did any man on the grand jury? A Not to my knowledge.

"Q Did any other witnesses appear before the grand jury except Sheriff Clark? A I don't believe so."

And from redirect we quote:

"Q The evidence related from somebody else's confession, Mr. Coffee, is that right? A Yes.

"Q And that's the only way you connected Mr. Douglas, with somebody else's purported confession, signed by a purported accomplice, was the only evidence before the grand jury connecting Mr. Douglas with this incident. Is that right? A Basically I guess that's right, because—as I remember, the information that we had came from the confession and from the investigation of the sheriff, which were related to us.

"Q And did he demonstrate to you anything that was a result of that investigation? A You mean what he found out?

"Q No, what he found. Did he find any physical evidence that he demonstrated to you? A You mean by physical evidence objects?

"Q That's right. A Well, the shell I guess would be a physical object.

"Q You mean by 'the' shell, you mean by 'a' shell? A Yes. Or physical objects, they had guns taken from the automobile.

"Q You had guns before the grand jury? A No, not before the grand jury, but he told us about guns that they had.

* * * * *

"Q Well, to the best of your knowledge Sheriff Clark was testifying purely from what he had been told, was

he not? A Well, that and what he had found out with his investigation.

"Q At no time did he tell you that he had observed the shooting or escaping car or anything surrounding the incident himself, did he? A No.

"Q And this purported confession that you saw was a handwritten document. Did you recognize that handwriting? A No, I didn't recognize the handwriting.

"Q And did you recognize anything about it that would indicate to you that you knew who had written it or signed it? A No. I had to go on what I was told.

"Q And do you know that it was purportedly written by an accomplice of Mr. Douglas? A Yes.

"Q But it was not written, signed, or witnessed by Mr. Douglas, was it? A I don't believe so."

Indictments must come from evidence either (a) given viva voce by witnesses before the grand jury or (b) furnished by documents laid before that body. Sheriff Clark's having been a witness before the grand jury is enough to comply with Code 1940, T. 30, § 86, which reads in pertinent part as follows:

"§ 86. In the investigation of a charge for any indictable offense, the grand jury can receive no other evidence than is given by witnesses before them, or furnished by legal documentary evidence; * * *

This section permits a grand jury to indict on hearsay alone, if furnished by a witness before the grand jury. *Washington v. State*, 63 Ala. 189; *Costello v. United States*, 350 U. S. 359; *Jones v. State*, 81 Ala. 79, 1 So. 32; *Agee v. State*, 117 Ala. 169, 23 So. 486. Younger, Case Note, IX Ala. Law Rev. 92.

Lack of cross-examination is the bedrock of the exclusion of hearsay before trial juries. Before a grand jury the

suspect is given no opportunity to be represented. Hence, hearsay exclusion would be without the adversary means to implement it. *Clark v. State*, 240 Ala. 65, 197 So. 23; *Fikes v. State*, 263 Ala. 89, So. 2d 303; *Gandy v. State*, 32 Ala. App. 513, 27 So. 2d 798. Cases such as *Walker v. State*, 17 Ala. App. 555, 86 So. 257, must be viewed as ignoring the effect of *Washington*, *supra*.

The confession of Loyd was inadmissible before a petty jury trying Douglas under the rule of *Connelly v. State*, 30 Ala. App. 91, 1 So. 2d 606. But since the hearsay exclusion does not operate before a grand jury, then *Connelly* would not affect the indictment against Douglas.

B. Details of Evidence before Grand Jury

The weight, credit and quantity of what evidence a grand jury receives is not a matter of enquiry once it is shown that that body had either a witness or a document before it.

The trial judge was not in error. *Gaines v. State*, 146 Ala. 16, 41 So. 865, following the leading case of *Sparrenberger v. State*, 53 Ala. 481.

II.

Evidence of Intent to Kill

Appellant's brief, in arguing proposition III, states:

"The state offered no facts which indicated an intent to kill Mr. Warren. The only facts from which such an intent could possibly be inferred is the use of a shotgun. However, the circumstances clearly negate an intent to kill. The state's evidence shows that the assailant knew that Mr. Warren would be encased in a heavy steel body of the tractor truck he was driving. The choice of a shotgun instead of a rifle was intentionally made to avoid the possibility of someone getting killed. Although some

shot did penetrate the tractor door and injure Mr. Warren, it was not with sufficient force to kill him. Had the assailant intended to kill, he would have used the rifle and shot Warren when he passed going in the same direction. Certainly no intention to kill can be inferred from the discharge of a shotgun between two vehicles traveling at high speeds and in opposite directions."

This argument, if based on uncontradicted proof of Warren's being in an armored vehicle, might have had some force with the jury. However, four of the exhibits (3, 6, 13 and 32) introduced by the prosecution show the window ledge and pane of the tractor cab torn open. This hole is consistent with the evidence of its being made with a shotgun.

The physician's testimony and Warren's evidence afforded the jury a description of wounds which, in our opinion, are sufficient when coupled with the use of a deadly weapon to support an inference of malice.

Under assault with intent to murder punishable under Code 1940, T. 14, § 38, the word "murder" is contextually that of the Common Law, i. e., the killing of a rational (human) being with malice aforethought. Hence, malice must be established. *Letcher v. State*, 145 Ala. 669, 39 So. 922 (opinion in So. Rep. only).

In *Walls v. State*, 90 Ala. 618, 8 So. 680 (modifying *Smith v. State*, 88 Ala. 23, 7 So. 103), we find (p. 622) an admonition to charge juries as to the need to find from all the evidence that the accused intended to take the life of the victim of his assault. See *Horn v. State*, 98 Ala. 23, 13 So. 329, as to need for "facts (to) raise the presumption of intent to murder."

Ray v. State, 147 Ala. 5, 41 So. 519, states that use of a deadly weapon near enough to fatally wound may

support a jury's inferring (shown by verdict) the malicious character of the assault.

Proof of both intent to kill and malice must exist. Both can be inferable from the same act of using a deadly weapon unless the circumstances (e. g., self defense) refute either such intent or malice. *Sparks v. State*, 261 Ala. 2, 75 So. 2d 103.

We consider the question here was one of fact; therefore, within the jury's province and not reviewable on appeal. Loyd's confession did not come into evidence against Douglas so that whatever Loyd said therein is not relevant.

III.

Out of Court Experiments

In ground 62 of his motion for new trial Douglas assigned that "the court erred in overruling the defendant's objections to the testimony of Robert B. Finley."

Presumably, he refers to rulings as to Mr. Finley testifying as to tests he made wherefrom he determined that the shot into Warren's tractor cab was made from not more than eight feet away. Cf. Anno. 86 A. L. R. 2d. 611, § 6, at p. 643.

In the second excerpt quoted above from Finley's testimony, there are three objections to plaintiff's Exhibit 37, a piece of cardboard into which Finley had fired the Winchester shotgun. This series of objections runs:

- (1) a) "not the same material, metal"; and
b) no showing of conditions "tests were made in";
- (2) "Not a fair comparison"—metal versus cardboard; and

(3) not under same conditions (a) speeding automobile vs. speeding truck, (b) same metal, (c) same shell, i. e., brand, type and size, (d) same age shell.

Under the majority opinion in *Straughan v. State*, 270 Ala. 229, 121 So. 2d 883, the pattern of shot scattering from a shotgun is not legally in the realm of common knowledge. One shown to be an expert can testify as to his opinion as to the distance from muzzle to target. Brock, the scattering expert, was properly allowed to base his opinion on (a) the gun and (b) the area of the body covered by the shot.

Whether the subject's being beyond common knowledge would make inadmissible a layman's evidence of out-of-court experiments in this field, we need not decide. Exhibit 37 was not introduced and was not certified with the record, hence we consider our review is limited to whether the State established Finley's qualifications as an expert witness on the pattern of scattering of shot from a shotgun so as to testify on hypothetical assumptions.

Finley (R. p. 103) testified he had had a period of four and one-half years of training with the State Toxicologist's bureau. During that time he had "tested" from 400 to 500 firearms of which 150 to 200 were shotguns. Considering the proof of Finley's testing some 150 to 200 pieces, we see no abuse of the trial court's discretion in view of the express holding in *Straughan*, *supra*.

Familiarly, the expert is someone with knowledge which the trial judge deems superior to that of the average man. Though Finley disclaimed himself as possessing special knowledge of "ballistics" we take it he was using this term in the sense of one who is skilled in comparing striations in bullets imparted by the lands and grooves of guns having

rifled bores. *Evans v. Commonwealth*, 230 Ky. 411, 19 S. W. 2d 1091, 66 A. L. R. 360; Wigmore, Note (warning against charlatan witness), 25 Ill. Law Rev. 692; 5 Am. Jur., Proof of Facts, Firearms Identification, at p. 126.

IV.

Opinon as to Shotgun Shell

Finley's testimony as to the hulls having been fired from the Winchester shotgun was properly predicated. In *Kyzer v. State*, 250 Ala. 279, 33 So. 2d 885, it was proper for a jury to compare an "evidence shell" with two "test shells" fired from the evidence gun.

Here Finley demonstrated his path of research by means of exhibits including large photographs of the "evidence shell," the breech block and firing pin of the "evidence gun" and "test shell." See *Kent v. State*, 121 Tex. Cr. 396, 50 S. W. 2d 817.

Certainly some firearms tests cannot be made in the courtroom. The reasoning of *Ferrell v. Commonwealth*, 177 Va. 861, 14 S. E. 2d 293, amply supports the trial judge.

V.

Motion for Continuance Because of Newspaper Reports

Warren, when shot, was driving a West Brothers truck pulling a trailer of Bowman Transportation Company. This latter company was engaged in a labor dispute with its drivers.

In oral argument there was some contention that violence which attends labor disputes is a phenomenon furnishing a legal justification similar to that claimed for those engaged in sports or warfare. This argument was made but rejected as a legal factor in defense of criminal charges in *Peyton v. State*, 40 Ala. App. 556, 120 So. 2d 415.

Much as the motor vehicle's making death more frequent without mitigating manslaughter, so outbursts of industrial friction must be treated by common law standards unless the Legislature should direct otherwise.

Along the same line as the contention of one ground of Douglas's motion for continuance were his Exhibits A, B, C, and D, clippings from The Selma Times-Journal, The Birmingham Post-Herald, The Birmingham News, and The Montgomery Advertiser. These were claimed to have made it impossible to strike an unbiased jury.

We find no error in the trial judge's overruling this motion. See the opinion of Price, P. J., in the companion appeal of *Loyd v. State*, 2 Div. 60.

VI.

Use of Written Confession to Refresh Recollection of Recalcitrant Witness

A.

Loyd, an accomplice, was convicted the day before Douglas was put to trial. The State called him as a witness against Douglas.

After answering a few preliminary questions, some straightforwardly, others by "Not to my knowledge," or "I'm not sure," Loyd was asked, " * * * If on the night of January 20, 1962, in Selma, Alabama, in the Dallas County jail didn't you make the following statement: 'I, Olen Ray Loyd, make the following statement of my own free will, * * * ?'"

To which Loyd replied, "I refuse to answer on the immunity of the laws of the State of Alabama and my constitutional rights."

Douglas can take nothing from the ruling of the court on Loyd's claim of immunity from self-incrimination. The privilege is personal. Had Loyd waived it, Douglas would have been confronted with testimony legal to use against him. *Beauvoir Club v. State*, 148 Ala. 643, 42 So. 1040; 8 Wigmore, Evidence (McNaughton rev. 1961), § 2259.

B.

A more serious claim of prejudice comes from the solicitor's reading from Loyd's purported confession.

~~An accomplice's confession given after the res gestae is not admissible against an accused before a petty jury. There must be confrontation face to face to allow viva voce cross-examination before the jury. *Connelly v. State*, supra; *Paterson v. State*, 202 Ala. 65, 79 So. 459; *Gore v. State*, 58 Ala. 391; Wharton, Criminal Evidence (12 Ed.) §§ 437-38. See *Hunter v. State*, 112 Ala. 77, 21 So. 65; also *McAnally v. State*, 74 Ala. 9.~~

In the instant case the purported written confession of the accomplice, Loyd, was used by the solicitor in cross examining Loyd after Loyd's being declared a hostile witness. The confession was put to Loyd in twenty-one consecutive fragments by questions such as:

"Q 'I, Olen Ray Loyd, make the following statement of my own free will, voluntarily and without any threats or hope of reward to Ralph Holmes, whom I know to be a state investigator, Sheriff James G. Clark of Dallas County, Alabama.' Did you make that statement and sign it? A I refuse to answer on the immunity of the laws of the State of Alabama and my constitutional rights.

"Q I further ask you, didn't you say, 'I have been informed that I do not have to make any statement unless

I desire to do so, that any statement I do make can be used * * *

The twentieth and twenty-first questions imply that the series made a complete document:

"Q And then in your own handwriting did you say, 'I, Olen Ray Loyd, have had above read to me, consisting of ten pages which I have initialed, and they are true and correct to the best of my knowledge.' And signed your name, 'Olen Ray Loyd'. Is that true? A I refuse to answer under the laws of Alabama and my constitutional rights.

"Q Then down below your name it was signed, 'Witnessed by Ralph Holmes, investigator for the Department of Public Safety of the State of Alabama', and under his name, 'James G. Clark, Sheriff, Dallas County, Alabama', and under his name, 'R. W. Godwin'. Was that done in your presence? A I refuse to answer under the laws of Alabama and my constitutional rights."

In *Willingham v. State*, 261 Ala. 454, 74 So. 2d 241, per Simpson, J., at p. 459, we read:

"* * * the appellant complains of the action of the trial court in permitting the State to show a written statement to the State's witness and asking the witness if that was her handwriting, if she had signed it in the Solicitor's office and if she didn't say that James Willingham struck at the Brown boy. As to the latter question, the appellant objected and made a motion for a mistrial. The court in one ruling overruled same. The appellant argues that the State was attempting to impeach its own witness. In *Louisville & N. R. R. Co. v. Hurt*, 101 Ala. 34, 13 So. 130, the court permitted the plaintiff to ask his own witness if he had not testified on a former trial in a certain manner. It was there held that it is a matter wholly within the discretion of the court to permit a party to refresh the memory of a witness. The court pointed out that was frequently and properly

done by showing the witness a memorandum, and by calling the attention of the witness to a particular statement. The same situation obtains here and we find no reversible error in this action of the trial court."

We distinguish the instant means from that found bad in *Kissic v. State*, 266 Ala. 71, 94 So. 2d 202. The opinion there plainly refuses to hold putting an impeaching transcription in evidence to be erroneous. The reversible error was playing the record before the jury (at p. 76):

" * * * We are not to be understood to hold that this latter admission into evidence was erroneous. The error was in the *playing of the record* in the presence of the jury when it contained illegal hearsay evidence and prejudicial statements. To permit either the state or the defendant to play records previously made of complete conversations with witnesses under the pretext of refreshing their recollection, would open the door to putting evidence before the jury which could never be admitted under the established rules of evidence, * * *" (Italics added.)

Thereafter a State witness was recalled. The record shows:

"W. R. JONES, recalled to the stand, testified further as follows:

"DIRECT EXAMINATION BY MR. McLEOD:

"Q Major Jones, I show you a paper here that is marked for identification purposes as Plaintiff's Exhibit No. 1, and ask you do you recognize that? A Yes, I do.

"Q And on the night of January 20, 1962, were you present in the Dallas County jail? A Yes, I was.

* "Q I will ask you if you are the same Major Jones who was on the stand previously? A Yes, sir."

"Q And who was present when Olen Loyd signed that? A Lt. Ralph Holmes, and Mr. Bob Godwin, and

Sheriff Clark, and FBI Agent Frye, and yourself—Bob Frye of the FBI.

"Q. Did you see him sign it? A. Yes, and Mr. Finley was present too.

"Mr. McLeod: Your witness.

"Mr. Esco: Did you introduce that instrument?

"Mr. McLeod: No, I didn't introduce it. I just had it marked for identification purposes.

"Mr. Esco: Let the record show, if you will, that the solicitor questioned as to State's Exhibit No. 1, and we move to exclude on the grounds that the document is based purely on hearsay.

"The Court: Motion is denied.

"Mr. Esco: We except, if you please."

The same proof was made by the testimony of Lt. Ralph Holmes, a State investigator, and also by that of an agent of the Federal Bureau of Investigation. The defense did not object to any of the questions to these witnesses. Defense counsel did move to exclude Lt. Holmes's testimony. This, however, came at the close of his examination in chief.

Whatever grounds of objection might have been apt as to the never-introduced Exhibit 1, we need not speculate. The failure to object before an answer is made lets the evidence come in. Overruling a motion to exclude such answers is not reversible error.⁶ *Green v. State*, 271 Ala. 106, 122 So. 2d 520.

⁶*Jackson v. State*, 260 Ala. 641, 71 So. 2d 825, which construes § 10 of the Act of June 24, 1943, for automatic appeals from death sentences, is not pertinent. This section is the only provision under the Plain Error doctrine of which we are aware in Alabama criminal appellate review. That the section sets up one rule of review for capital convictions and another for other cases is beyond the jurisdiction of this court.

Judge McElroy, in *The Law of Evidence in Alabama* (2d Ed.) Vol. 1, § 165.01(e), p. 391:

"It has been said that a party 'may remind' his own witness of a previous inconsistent statement by him, for the purpose of refreshing his recollection, e. g., 'by reminding the witness of his testimony before the grand jury' (*Glenn v State*, 157 Ala 12, 47 So 1034) or by 'reminding the witness of his testimony on the former trial' (*Woodard v State*, 253 Ala 259, 44 So2d 241, syl 13).

"The quoted statements of the Supreme Court do not mean that counsel can properly state in the presence of the jury that the witness testified to certain things before the grand jury or on a former trial. Although a party for the purpose of showing his surprise or of refreshing his own witness' recollection, may ask the witness whether he gave certain testimony on the prior occasion, it is decidedly improper for counsel to declare that the witness in fact gave such testimony (*Kirkpatrick v State*, 18 Ala App 389, 92 So 238, syl 1)—for the reason that counsel himself would, in effect, be giving testimony."

The *Kirkpatrick* opinion rests on *Billingslea v. State*, 85 Ala 323, 5 So 137, *Thompson v. State*, 99 Ala. 173, 13 So. 753, and Mayfield's Dig. 880.

In the second paragraph of the *Billingslea* opinion, Stone, C. J., points out that in the absence of an answer, the bill of exceptions "was not enough to raise the question." In *Thompson* the witness "had just stated, that he did not remember how many times he had been to Edmund Stegars' house." The solicitor then asked him questions from a memorandum of his testimony before the grand jury.

We do not understand that there is any contention that the solicitor attempted to use Loyd's written confession for any purpose—at least in examining Loyd—other than to jog his memory. Refreshing Loyd's memory was permissible

because of his claiming not to know, not being sure and the like.

After the solicitor read portions to him and Loyd began claiming immunity from self-incrimination throughout the twenty-one questions, Douglas's counsel stopped objecting.

In this state of the record, even though it might be claimed that the repeated and cumulative use of the confession might have been an indirect mode of getting the inadmissible confession in evidence, yet the failure to object was waiver. There must be a ruling sought and acted on before the trial judge can be put in error. Here there was no ruling asked or invoked as to the questions embracing the alleged confession.

VII.

Arraignment

Douglas's contention that he was never arraigned is unsupported by any fact in or out of the record. He filed a motion for new trial. From the order denying it, it appears that the motion was submitted on the trial transcript without other proof being adduced.

The case of *Hamilton v. Alabama*, 368 U. S. 52 (see 273 Ala. 504, 142 So. 2d 868), was a *coram nobis* proceeding. The opinion on appeal, 270 Ala. 184, at 188 (cert. den. 363 U. S. 852), shows an unsuccessful collateral attack on the record judgment by use of bench notes.

Here we have an *ipse dixit* to contradict the record. The record shows arraignment.

VIII.

Sufficiency of the Evidence

Regarding the sufficiency of the evidence, we start with no dispute as to the *corpus delicti* being shown.

The agency of Douglas's committing (or aiding and abetting Loyd in committing) the assault by shotgun on Warren must rest on circumstantial evidence.

We consider the record shows sufficient evidence to support the verdict and the judgment on it. We refer particularly to the following:

- 1) The finding in the cab of the truck of a plastic wad from a "Peters" shot gun shell.
- 2) The testimony of Warren and Gorff as to the 1959 White Ford with one burned-out tail light seen by them on Highway 5 shortly before the shooting.
- 3) The car's bearing Jefferson County tags (i. e., with "1A" prefix) at one time, and Etowah County tags ("31") at another.
- 4) The testimony of Mr. Williamson as to his seeing Loyd and Douglas in a 1959 White Ford with one burned out tail light with a shotgun and shells at the road block.
- 5) The evidence of Loyd and Douglas being in the car at Ohatchee.
- 6) The various guns (e. g., rifle in front grill) in car.
- 7) "Peters" 00 magnum shells found in car.
- 8) Possession of two sets of license plates.
- 9) The nine and a half mile roadside search on Highway 5 leading to the finding of the shell—Exhibit 2.
- 10) Finley's testimony, particularly as to
 - (a) connection of shell and shotgun;
 - (b) distance of shot from truck (permitting in-

ference which would exclude roadside pedestrian's firing); and

(c) identification of plastic wad.

Remoteness of time and also of place from the res gestae is a matter left to the jury if there is other relevance in a circumstance. *Busbee v. State*, 36 Ala. App. 701, 63 So. 2d 290; *Petty v. State*, 40 Ala. App. 151, 110 So. 2d 319; *Doritch v. State*, 40 Ala. App. 475, 115 So. 2d 287; *Pitts v. State*, 40 Ala. App. 702, 122 So. 2d 542. See also *Mott v. State*, 40 Ala. App. 144, 109 So. 2d 309, and McElroy, Evidence (2d Ed.), Vol. 1, § 21.01(3), pp. 16-17.

The circumstance of an accused's fleeing is admissible as an admission.

Thus, in *Goforth v. State*, 183 Ala. 66, 63 So. 8, there were two men indicted for the murder of Nicholas Shintzen. The opinion refers approvingly to proof of various efforts (such as leaving trains at unusual places, using assumed names, etc.) bearing on whether the accused were *fugitives from justice*.

In *Crenshaw v. State*, 225 Ala. 346, 142 So. 669, the defendant tried a disguise and gave another name. Bouldin, J., characterized this ruse as "admissible on the same principle as evidence of flight."

We consider evidence of the change of license plates between the scene of the shooting and the roadblock at Woodstock was relevant to show a wish to escape detection.

We have reviewed the entire record and consider the judgment of the circuit court should be

AFFIRMED.

Testimony Relating To Loyd's Confession

OLEN RAY LOYD, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. McLEOD:

Mr. Esco: At this time I'd like to object to this witness appearing on the stand, and state to the record that I represent this witness, who is a defendant who yesterday evening was convicted of assault with intent to murder in this Court, who has filed a formal appeal with this Court and the appeal bond has been filed and approved.

(The Court calls Mr. Esco to the bench)

Mr. Esco, continuing: Order allowing appeal and setting his bond was subsequently vacated by the Circuit Judge on the same date. That this witness has in open court by and through Sam Earl Esco, Jr., as his attorney, given notice of appeal and said appeal is now pending.

The Court: Overrule.

Mr. Esco: We except, if you please.

Q. What is your name? A. Olen Ray Loyd.

Q. Where do you live? A. (No answer)

Q. Where is your home? A. I refuse to answer on the grounds that any answer I give will tend to incriminate me.

Mr. McLeod: Your Honor, I'll have to ask the Court to instruct him to answer the question.

The Court: Yes, sir. Mr. Loyd, the understanding of the Court is that the jury has already determined your guilt in the only case pending in this Court arising out of this alleged transaction, and that the benefits and prohibitions of the Fifth Amendment have no application to you and your testimony on this witness stand. You cannot enforce them successfully, and the Court instructs you that you are required and will be required to answer.

Q Where do you live? A Gadsden, Alabama.

Q On the 18th day of January, 1962, were you arrested in Ohatchie, Alabama? A I claim the privilege—I claim the privilege under the Fifth Amendment to my constitutional rights.

Mr. Esco: I object.

The Court: The Court overrules the objection. The Court instructs you that you are required to answer.

A Not to my knowledge.

Q On Saturday, January 20, 1962, were you in the Dallas County jail? A Not to the best of my knowledge.

Q Do you remember talking to Mr. Robert Frye, the FBI agent, at that time? A Not to the best of my knowledge.

Mr. McLeod: I will ask the Court to force this man to answer the question.

Mr. Esco: If the Court please, we object to forcing this man to do anything. This is not a country of force, this is a country of law.

The Court: I can't force this witness to answer. All I can do is to tell him that he is in contempt of this Court. That's all I can tell him.

Mr. Esco: Your honor, to shorten this and not make a mockery of justice, let me state plainly that I have instructed this witness to claim his constitutional privilege and not to answer any questions. And if your Honor would like to judge me in contempt of Court—let's not make a circus of this—

The Court: I will call you back here.

(The Judge, Mr. Esco and Mr. McLeod leave the court room)

(The witness leaves the court room with Mr. Esco)

(The witness returns to the witness stand)

Mr. Esco: At this time I move that this witness be excluded from the witness stand on the grounds that we have given notice of appeal in this case, that we are preparing a motion for a new trial, that he is privileged from constitutional law of the United States from testifying at this time and that he is claiming the right.

The Court: The motion made is overruled and denied.

Mr. Esco: We except, if you please.

Mr. McLeod: I would like to ask the Court to declare this witness—I called this man as my witness. He has proven to be a hostile witness. I would like to ask the Court to declare him a hostile witness and give me the privilege of cross-examination.

The Court: Yes, sir.

Mr. Esco: If your Honor please, I ask at this time if you are going to hold the man in contempt?

Q Is that your signature (showing witness signature on confession)? A I'm not sure.

Q I will ask you if on January 20, 1962 - - -

Mr. Esco: (Interrupting) If your Honor please, I object to the reading of any document or purported confession, - - -

Mr. McLeod: (Interrupting) This is cross-examination.

The Court: Hostile witness. Overrule.

Mr. Esco: We except, if you please.

Q I will ask you if on the night of January 20, 1962, in Selma, Alabama, in the Dallas County jail if you didn't make the following statement: (reading) "I, Olen Ray Loyd, make the - - - "

Mr. Esco: (Interrupting) I object to this being read in the presence of the jury.

Mr. McLeod: You've already got an objection in there.

Mr. Esco: I object to this being read in the presence of the jury.

The Court: Overrule.

Mr. Esco: We except.

Q "I, Olen Ray Loyd, make the following statement of my own free will, voluntarily and without any threats or hope of reward to Ralph Holmes, whom I know to be a state investigator, Sheriff James G. Clark of Dallas County, Alabama." Did you make that statement and sign it? A I refuse to answer on the immunity of the laws of the State of Alabama and my constitutional rights.

Q I further ask you, didn't you say, "I have been informed that I do not have to make any statement unless I desire to do so, that any statement I do make can be used against me in a court of law, and that I have the right to have the advice of an attorney before making any statement", did you make that statement? A I refuse to answer on the immunity of the laws of the State of Alabama and my constitutional rights.

Q Did you further say, "I am thirty-nine years of age and was born September 9, 1922, at Kenner Alabama. I live at 742 Brookside Drive, Gadsden, Alabama. I was employed as a truck driver for Bowman Transportation

Company in Gadsden, Alabama, until we went on strike on November 4, 1961." Did you make that statement? A I refuse to answer on the immunity of the laws of the State of Alabama and my constitutional rights.

Q Did you further say, "On January 17, 1962, I went to the union hall in East Gadsden and signed in to walk the picket line at Bowman Transportation Company. I walked until I was relieved by another boy at 4:45 that evening, who told me the police were at the union hall and wanted to talk to me. He took my place in the line and I went to the hall. When I arrived at the back door of the hall Mr. Fred Renegar met me and he said that he had a call from Birmingham for me to make a 'trip'. He was, I think, referring to a trip where I would drive a truck as he said I would probably be glad to get a trip. He asked me if I would be willing to make a trip with Jesse Douglas and that we should report to the union hall in Birmingham, Alabama, at 6:30 p. m. He asked me if I had to go home to tell my wife and I said that I would." Did you make that statement? A I refuse to answer on the immunity of the laws of Alabama and my constitutional rights.

Q Did you make the further statement, "I left the hall and went to Cargo Standard Service Station in Gadsden and purchased six gallons of gas for my car on credit. I told Mr. Cargo that I had to go to Birmingham to make a trip and I would pay him when I returned. I left the station and went to my father-in-law's home in Campbell Court. His name is W. B. Morgan and I told him I had to make a trip and that I needed some money to eat on and I borrowed \$10.00 from him." Did you make that statement? A I refuse to answer on the immunity of the laws of Alabama and my constitutional rights.

The Court: I have heretofore stated, since this witness has been on the stand, that the protection of the Fifth Amendment is not available to this defendant and that under the instructions of the Court that he is required to answer, relevant to these pertinent questions, as may be passed upon by the Court.

Q Did you make the further statement, "I left there and went to the union hall and picked up Jesse Douglas. We left the hall and went to my home and I told my wife that I was going to Birmingham to make a trip. I told her that I didn't know who for or where we were going to make the trip. When we left Gadsden I had two shotguns, the rifle that we got at Bob Arrington's house on the night of 1-15-62, some shotgun shells that were in a army bandalier. We had no ammunition for the rifle in the car. The shotgun shells were all 12 gauge and were double 'O' buck and 'pumpkinballs'. The shotguns were a J. C. Higgins pump and an automatic shotgun that belongs to a B. F. Jackson in Gadsden and I do not know the make of this gun." Did you make that statement? A I refuse to answer on the immunity of the laws of Alabama and my constitutional rights.

Q Did you make the further statement that, "Jesse Douglas and I went to Birmingham, Alabama, arriving there about 6:30 p. m. and checked in at the union hall to Sam Webb. Webb asked us if we knew why we were down there and I told him I thought to make a trip and he asked if Renegar had told us exactly why and I said that I thought I was to drive a truck somewhere. He said there was a little more to it than that and that there was two Bowman trailers at the West Brothers terminal in Birmingham that was going to run that night and we were to follow these trailers and scare them so they wouldn't be driving any more. Webb asked me if I had anything to scare them

with and I told him about the shotguns and rifle in my car and he said not to use the rifle because that might kill a driver, that he thought the shotgun would be best. We left the union hall in Webb's car and he drove us by the West Brothers terminal to see if the trailers had left there. They were still there so we returned to the union hall. That was about seven p. m. in the evening. He asked if I had any other tags other than the tag that was registered to my car and I told him that I did not. He told me to take the front tag off of his car and use it on my car." Did you make that statement? A I refuse to answer on the immunity of the laws of Alabama and my constitutional rights.

Q Did you further make the statement, "I asked him what I would do with the tag if we made any contact with any trucks and he said hold it and he would pick it up later. He did not offer to pay us any money at that time but he asked if we had any money to eat on. I told him I had borrowed \$10.00 before I left Gadsden, Alabama, and that my car was low on gas. He took us by a service station, a Texaco station near the union hall and filled the car with gas which he paid for on his credit card. After we gassed up we went to the union hall and picked up Webb's tags from his car. He let us out of the rear door of the hall to go around to the side of the hall where his car was parked and Jesse and I took the front tags off his car." Did you make that statement? A I refuse to answer under the laws of the State of Alabama and my constitutional rights.

Q Did you make the further statement, "We left the hall and drove toward Gadsden so that if anyone saw us they would think we were going back to Gadsden. We went out Tenth Avenue, crossed over one block to Georgia Road, and followed this road to First Avenue. We turned south on First Avenue and went all the way through Birmingham

to the Birmingham-Bessemer Highway. We stopped at Mary's Drive-In for sandwiches and coffee and spent about an hour or an hour and a half there." Did you make that statement? A I refuse to answer under the laws of Alabama and my constitutional rights.

Q Did you make the further statement, "We waited there at the Drive-In because Webb had told us these Bowman trailers would be coming out the Birmingham-Bessemer Highway. We left Mary's Drive-In around nine p. m. or nine-thirty p. m. as we got tired sitting there and went south to Bessemer. We turned around near Bessemer and came back to a big bowling alley on this highway. Between the time we left Mary's Drive-In and about eleven p. m. we headed toward Birmingham and met the two Bowman trailers coming out being pulled by West Brothers tractors." Did you make that statement? A I refuse to answer under the immunity of the laws of Alabama and constitutional rights.

Q Did you make the further statement, "We turned off a side street and changed the tags on my car. We took both of my tags off, front and back, and put Webb's tag on the back of my car. We went back to the Birmingham-Bessemer Highway and headed south behind these trucks. We came up on the rear of these trucks on the hill which is near the Alabama Highway Patrol station in Midfield. We passed these trucks on this hill and went on ahead of the trucks through Bessemer. After getting through Bessemer we then speeded up to about sixty or seventy miles an hour and traveled down Highway 11 to the junction of 5 and 11. We turned down No. 5 toward Centreville, Alabama. We went to the city limits of Centreville and then turned around and went back north on No. 5. When we left Birmingham, Alabama, Douglas was driving and he was still

driving at the time we turned around at the city limits of Centreville. I was going to handle the shooting and had gotten into the back seat of my car." Did you make that statement? A I refuse to answer under the laws of Alabama and my constitutional rights.

Q Did you make the further statement, "We intended to shoot these trucks before they got to Centreville, but when we turned and went back north and passed the trucks again I was unable to bring myself to the point of shooting the truck. After we passed the trucks this time we turned around and went south again toward Centreville, Alabama. These trucks were both stopped at a truck stop in Centreville where we passed them again and we proceeded on south on No. 5 about twenty miles. We set alongside of the highway waiting for the trucks to come on and several trucks passed us, so we thought we ought to move before someone recognized us. We went back north again and saw a station wagon that looked suspicious so we turned off No. 5 onto 16. We drove over this route about six or eight miles and pulled in behind a church. We sat there for about five minutes and then heard what sounded like two trucks together going south on No. 5. We thought this was the two trucks and we went back to No. 5. When we got to No. 5 I told Douglas that I would drive and he said that was fine because I knew the car better than he. I drove on until we caught these trucks about five or eight miles above the junction of No. 5 and No. 80 and we passed them proceeding on to the junction where we turned around and headed back north to meet these trucks. Jesse Douglas was in the back seat with the automatic shotgun that belongs to B. F. Jackson and had it loaded with buckshot. He rolled down the window and when we passed these trucks he shot the lead truck as we passed them heading back north as

they were coming south. We then went on to Highway 14, turned left and went into Greensboro, Alabama. We turned left in Greensboro on No. 69, drove south about five miles and realized we were going the wrong direction to go to Tuscaloosa, Alabama. We turned around and went back up to No. 69 to Tuscaloosa." Did you make that statement? A I refuse to answer under the laws of Alabama and my constitutional rights.

Q "I judge that the truck was shot between two a. m. and two-thirty a. m. and between that time and when we got to Greensboro we stopped one time and switched the tags back on the car. After we got north of Tuscaloosa about twelve miles we stopped at Frederick's Truck Stop and gassed up. This was about four-thirty a. m. I bought \$5.00 worth of gas. This truck stop is on Highway No. 11 out of Tuscaloosa. And about ~~thirty~~ minutes after we left there we were stopped at the intersection of Highway No. 11 and No. 5 by two Alabama Highway Patrolmen. When I turned to the right on No. 5 we were stopped and checked. They told us at that time there had been a truck driver shot in Dallas County and they were making a survey of all cars. They found my pump shotgun and a part of a box of shells in the trunk of the car, but we had put the automatic and the rifle under the hood of the car between the grill and the radiator. I told them I had been hunting and had not taken my gun out of the car." Did you make that statement? A I refuse to answer under the laws of Alabama and my constitutional rights.

Q Did you make the further statement, "We told them we were on our way to Anniston, Alabama, to hunt for work. They asked where we had come from and I said from Tuscaloosa, Alabama, but we did not live there, that we had been hunting for work and that we lived in Gadsden,

Alabama. This check was made about five in the morning, and after this we headed toward Gadsden, Alabama. We went south on No. 5 toward No. 24 at West Blocton, Alabama, took No. 24 out of there and ran onto a dirt road where we were lost for sometime. We finally hit a little country road No. 10 into Montevallo, Alabama, took No. 25 out of Montevallo and followed this to near Childersburg where we made a stop on a dirt road and there we put the automatic shotgun in the back seat and the shells in the well over the back fender. We had previously, when we changed tags, put the tags belonging to Webb under the rubber floor mat on the driver's side. We continued on this dirt road until it came back out on No. 25 and followed this route on up through Leeds, Alabama. We took 78 out of Leeds to the junction of No. 78 and No. 77. We turned left on No. 77, headed north, and were stopped near Chatchee, Alabama, by the police. After the police stopped us we waited there until an Alabama Highway Patrol car came up and the police drove my car with Douglas in it with him, and I rode with the Alabama Highway Patrolman to the Alabama Highway Patrol station in Anniston, Alabama." Did you make that statement? A. I refuse to answer under the laws of Alabama and my constitutional rights.

Q. And then were you asked this question and gave this answer to it, "Who loaded the automatic shotgun?" "I don't recall which one loaded it the last time." Were you asked that question and was that your answer? A. I refuse to answer under the laws of Alabama and my constitutional rights.

Q. Were you asked the question, "How many shots were fired at the truck?" And your answer, "Only one." Did you say that? A. I refuse to answer under the laws of Alabama and my constitutional rights.

Q Were you asked this question, "Was the empty ejected inside the car?" And your answer, "When it was fired, to the best of my knowledge it was." Is that true? A I refuse to answer under the laws of Alabama and my constitutional rights.

Q Were you asked the question, "What happened to the empty shell?" And your answer, "To the best of my knowledge it was found by Douglas and thrown out the car some three to five miles north of the shooting." Is that true? A I refuse to answer under the laws of Alabama and my constitutional rights.

Q Were you asked the following question, "Did Douglas say if he found the shell?" And then the answer was, "Yes, and he said he threw it out the window." Is that true? A I refuse to answer under the laws of Alabama and my constitutional rights.

Q And then in your own handwriting did you say, "I, Olen Ray Loyd, have had above read to me, consisting of ten pages which I have initialed, and they are true and correct to the best of my knowledge." And signed your name, "Olen Ray Loyd". Is that true? A I refuse to answer under the laws of Alabama and my constitutional rights.

Q Then down below your name it was signed, "Witnessed by Ralph Holmes, investigator for the Department of Public Safety of the State of Alabama", and under his name; "James G. Clark, Sheriff, Dallas County, Alabama", and under his name, "R. W. Godwin". Was that done in your presence? A I refuse to answer under the laws of Alabama and my constitutional rights.

Mr. McLeod: Judge, I'd like to ask the Court to require this man to answer my questions.

The Court: We will take about a ten minute recess and you gentlemen may retire to the jury room.

(Jury retires to the jury room, and court stands in recess for a few minutes)

(Court called to order and Olen Ray Loyd returns to the witness stand with the jury still out of the court room)

The Court: Court will come to order.

Mr. Esco: I'd first like to object to the reading of this purported confession on the grounds that it is hearsay evidence, that it was made outside the hearing of this defendant, it was not subject to cross-examination, and we move to exclude it from the evidence.

The Court: The Court will deny your motion.

Mr. Esco: We except, if you please. And at this time, your Honor, we make a motion for a mistrial on the grounds that this jury has been so prejudiced from these proceedings, and from the attempts of the prosecution to use illegal evidence, that no fair and just verdict whatsoever could come from a jury that has been so prejudiced.

The Court: Motion is denied.

Mr. Esco: We except, if you please.

The Court: Mr. McLeod, as to the witness presently on the stand, the Court instructs you to file in the Circuit Court of Dallas County in Equity an information charging him with contempt of Court, with a particular failure and refusal of the defendant to comply with the instructions and orders of this Court. The Court will set that matter down for hearing at its earliest convenience.

Mr. Esco: Your Honor, please, I move at this time that the witness be allowed to expunge himself of contempt—

of possible contempt—and make answer as best he may of the questions asked him by the solicitor. Must he remain in jail under this civil case?

The Court: Just so long [redacted] remains obdurate.

The Court: All right now. Are you ready for a jury?

Mr. McLeod: Yes, sir.

The Court: Have the jury brought in.

(Jury returns to the jury box)

Q Mr. Loyd, I will ask you again, is that your signature (holding confession before witness)? A Mr. McLeod, I'm not sure. I don't know. I'm not positive.

Q Did you make a statement to Mr. Bob Frey, FBI agent, and Mr. Ralph Holmes, Mr. James G. Clark, Jr., at the Dallas County jail on January 20, 1962? A Mr. McLeod, I'm not sure. I was under a lot of pressure then, and I don't know for sure.

The Court: The Court will stand in recess for five minutes. Gentlemen, you may go back out. I will give you five minutes if you wish to confer with your client.

(The jury retires to the jury room)

The Court: The Court does not intend to be made a mockery or a circus as you intimated a few minutes ago. He can either answer or he can not answer. We will stand in recess for five minutes.

(Olen Ray Loyd returns to the witness stand)

The Court: Mr. Loyd, are you willing to purge yourself of contempt of the Court and testifying or not?

The Witness: Yes, sir.

The Court: You are. All right. Call the jury.

(The jury returns to the jury box, and Mr. Loyd continues on the witness stand)

Q Mr. Loyd, I show you a paper here, consisting of ten handwritten pages, and I will ask you, is that your signature? A Er - - - I made a statement to - - - er - - -

Q (Interrupting) I'm asking you, is that your signature (holding confession before witness)? A I'm not sure, Mr. McLeod, whether it is or not.

The Court: All right. The jury is excused.

(The jury retires to the jury room)

The Court: Come around, Mr. Loyd.

(The witness leaves the witness stand and comes before the Judge)

The Court: Mr. Esco, will you step up here?

(Mr. Esco stands beside Mr. Loyd in front of the Judge)

The Court: There has been considerable effort here to get the Court to set an appeal bond for you, and I understand the papers are in process to mandamus this Court to grant you an appeal. I don't think until you are sentenced you have the privilege of appealing, and this Court at this time is going to accommodate you. Now, yesterday or last evening you heard the verdict of the jury, which reads as follows: "We, the jury, find the defendant guilty of assault with intent to murder, as charged in the indictment. Calvin L. Harrell, Jr." returned into Court, did you?

The Witness: Yes, sir.

The Court: Do you have anything to say why the judgment of the Court should not be pronounced against you at this time?

The Witness: No, sir.

The Court: All right. According to the verdict of the jury finding you guilty of assault with intent to murder, as charged in the indictment, you are accordingly adjudged to be guilty of assault with intent to murder as charged in the indictment, and as punishment for said offense you are sentenced to the penitentiary of Alabama for a period of twenty years. Mr. Clark, will you take the prisoner?

The Court: Is there notice of appeal?

Mr. Esco: Yes, sir.

The Court: The Court will set your appeal bond at \$50,000.00.

(The sheriff removes the prisoner from the court room)

The Court: Call the jury in, please.

(The jury returns to the jury box)

Mr. Esco: We would like to make a motion for a new trial on the grounds that the proceedings have been very irregular here today and we feel it has been prejudicial to this defendant.

The Court: Let the record show, Mrs. Bailey, that the jury has not been in the court room or present during the preceeding hearing. Your objection is overruled.

Mr. Esco: It is a motion, your Honor.

The Court: Your motion is overruled.

Mr. Esco: We except, if you please.

W. R. JONES, recalled to the stand, testified further as follows:

DIRECT EXAMINATION BY MR. McLEOD:

Q Major Jones, I show you a paper here that is marked for identification purposes as Plaintiff's Exhibit No. 1, and ask you do you recognize that? A Yes, I do.

Q And on the night of January 20, 1962, were you present in the Dallas County jail? A Yes, I was.

Q I will ask you if you are the same Major Jones who was on the stand previously? A Yes, sir.

Q And who was present when Olen Loyd signed that? A Lt. Ralph Holmes, and Mr. Bob Godwin, and Sheriff Clark, and FBI Agent Frye, and yourself—Bob Frye of the FBI.

Q Did you see him sign it? A Yes. And Mr. Finley was present too.

Mr. McLeod: Your witness.

Mr. Esco: Did you introduce that instrument?

Mr. McLeod: No, I didn't introduce it. I just had it marked for identification purposes.

Mr. Esco: Let the record show, if you will, that the solicitor questioned as to State's Exhibit No. 1, and we move to exclude on the grounds that the document is based purely on hearsay.

The Court: Motion is denied.

Mr. Esco: We except, if you please.

LT. RALPH H. HOLMES, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. McLEOD:

Q Lt. Holmes, what is your name? A Ralph H. Holmes.

Q What is your occupation? A Criminal Investigator for the Department of Public Safety of the State of Alabama.

Q Were you in that capacity during the month of January, 1962? A I was.

Q On or about the night of January 20, 1962, were you in the Dallas County jail in Selma, Alabama? A Yes, sir.

Q And who was present with you when you went in that Dallas County jail, Lt. Holmes? A Frye and myself.

Q I'm talking about approximately ten or eleven o'clock at night? A Myself, Mr. Frye, you, Sheriff Clark, Major Jones and Captain Godwin.

Q Was Mr. Finley, the State criminalist, present? A Yes, sir, Mr. Finley.

Q I will show you a paper here that is marked for identification purposes as Plaintiff's Exhibit No. 1 and ask you do you recognize that? A I do.

Q And whose name is signed to it? A The name of Olen Ray Loyd.

Q And witnessed by whom? A Myself and Sheriff Clark and R. W. Godwin.

Q Were you present when Olen Ray Loyd prepared this? A Yes, sir.

Q With the exception of the last paragraph, in whose handwriting is that? A Mine.

Q Whose handwriting is the last paragraph? A Olen Ray Loyd.

Mr. McLeod: That's all, Lt. Holmes.

Mr. Esco: I'd like to object and move to exclude this testimony as to Plaintiff's Exhibit No. 1, which this witness testified.

The Court: Motion is denied.

Mr. Esco: We except.

CROSS EXAMINATION BY MR. ESCO:

Q Mr. Holmes, the persons you named, were they all of the persons present at that time? A I'm almost sure they were. They were all that were present at that particular time.

Q Was the person who signed that statement's attorney present? A No, sir.

Mr. Esco: Thank you, sir.

Mr. McLeod: Come down, Lt. Holmes.

ROBERT L. FRYE, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. McLEOD:

Q What is your name? A Robert L. Frye.

Q What is your occupation? A Special Agent for the Federal Bureau of Investigation.

Q Where are you stationed, Mr. Frye? A In Selma.

Q Were you stationed in Selma during the month of January, 1962? A I was.

Q And on the night of January 20, 1962, did you have occasion to be at the Dallas County jail? A I was.

Q Approximately somewhere between ten and eleven o'clock on the night of January 20, 1962—I withdraw that. First, I will show you a statement that is marked for

identification purposes as Plaintiff's Exhibit No. 1, and ask you do you recognize that? A I do.

Q Whose name is signed to it, Mr. Frye? A Olen Ray Loyd.

Q Did you see Olen Ray Loyd sign this paper? A I did.

Q You recall who else was there at the time he signed this paper and who witnessed this paper being signed? A Lt. Holmes—Ralph Holmes, he is an Alabama Highway Patrol investigator; Chief William Jones; Sheriff Clark; and Assistant Chief Godwin was there; and Bob Finley, State criminalist. That's all I recall.

Q Was I there? A You were there at that time.

Mr. McLeod: Your witness.

CROSS EXAMINATION BY MR. ESCO:

Q Mr. Frye, was this the only document signed that night in your presence? A No, sir.

Q Was there another document signed? A I took a statement.

Q Do you have that statement available? A I don't.

Q Could you release that statement for comparison use? A No, I don't have it in my possession.

Q How long would it take you to get it, Mr. Frye? A At least a day. It is in Mobile.

Mr. Esco: I believe that's all.

Mr. McLeod: Come down, Mr. Frye.

Office-Supreme Court, U.S.

FILED

S SEP 9 1964

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 313

JESSE ELLIOTT DOUGLAS,

Petitioner

V.

STATE OF ALABAMA

Respondent

BRIEF AND ARGUMENT

IN OPPOSITION TO PETITION FOR WRIT

OF CERTIORARI

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I

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals of Alabama is reported as *Jesse Elliott Douglas v. State of Alabama*, 2nd Division 61, 163 So. 2d 477, and is set out in full in the Appendix to the petition for a writ of certiorari filed in this Honorable Court.

The case was decided on October 8, 1963. An application for rehearing in the Court of Appeals of Alabama was denied without opinion on November 12, 1963. The petitioner filed a petition for a writ of certiorari in the Supreme Court of Alabama and the writ was denied on March 26, 1964. *Jesse Elliott Douglas v. State of Alabama*, 2nd Division 453, 163 So. 2d 496. An application for rehearing in the Supreme Court of Alabama was denied without opinion, on April 30, 1964.

II

JURISDICTION

The petitioner has applied for a writ of certiorari from this Honorable Court to review the judgment of the Court of Appeals of Alabama, rendered October 8, 1963, rehearing denied November 12, 1963, under the provisions of Title 28, Section 1257(c), United States Code, Judiciary and Judicial Procedure. (See petitioner's brief, pages 1 and 2.)

III

QUESTIONS PRESENTED

The petition in this case raises the following issues:

1. Whether the petitioner, who stands convicted in a State court of assault with intent to murder, was denied due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States by virtue of the fact that the prosecutor was allowed to question an accomplice as a witness for the State at petitioner's trial concerning the contents of a written statement made by the accomplice to law enforcement officers.
2. Whether said petitioner was denied such due process of law by virtue of the fact that the State appellate court refused to consider matters dehors the record and refused to allow the petitioner, who is charged with the duty of presenting a correct record to the court, to amend the record after it was filed in such court.

IV

CONSTITUTIONAL PROVISION INVOLVED

Petitioner alleges a denial of rights guaranteed to him by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was indicted by a Grand Jury of Dallas County, Alabama, for the offense of assault with intent to murder. Title 14, Section 38, Code of Alabama 1940, as Recompiled 1958. After hearings thereon, petitioner's motion to quash the indictment and his motion for a continuance were overruled. Upon arraignment a plea of not guilty was entered and trial was had before a jury which returned a verdict of guilty as charged in the indictment. In accordance with the verdict of the jury, the trial court rendered an adjudication of guilt and sentenced petitioner to imprisonment for a period of twenty years, whereupon notice of appeal was given. Subsequently, the trial court overruled petitioner's motion for a new trial.

Prior to the introduction of any evidence on the merits, hearings were conducted on petitioner's motion to quash the indictment and on his motion for a continuance. The State pleaded the general issue to the motion to quash, and the testimony of three grand jurors who returned the indictment was introduced. The testimony of these witnesses tended to show that when the case was presented to the grand jury, the Sheriff of Dallas County, Alabama, testified before said jury and there was exhibited a statement which had been signed voluntarily by an alleged accomplice of petitioner; together with a shotgun shell hull. Petitioner's attorney was not allowed to inquire into the details of the evidence presented to the grand jury.

The only evidence introduced at the hearing on the motion for a continuance were several newspaper articles in which were reported the trial of petitioner's alleged accomplice.

This case arises out of the shooting of a truck driver in Dallas County, Alabama, near the intersection of Highway 5

and Highway 80, at approximately 2:30 a. m., January 18, 1962.

The evidence tends to show that about midnight on January 17, 1962, one C. L. Warren, who was employed by West Brothers Motor Express and who was a member of Teamsters Union, Local 612, left Birmingham driving a Bowman Transportation Company tractor-trailer type transport truck. He was headed South through Alabama, his destination being New Orleans, Louisiana. There were other trucks making this same trip, and one Edward Gorff was driving a truck immediately behind the one driven by Warren.

After leaving a truck stop near Centreville, Alabama, Warren and Gorff noticed a 1959 Ford Galaxie, which carried a Jefferson County, Alabama, license plate, as it passed them, headed South in the same direction as their two trucks. Gorff noticed that this Ford's right tail light was not burning and that a black object lay on its back window shelf. A short time after this car had passed the trucks, a car of the same description was seen by Gorff headed North toward Warren and him. As this car met Warren's truck, there were fired from the car shots which hit the truck and also hit Warren in the arm and in the chest. Gorff stopped his truck to assist Warren and to see that he received medical attention. Warren was hospitalized for twelve days, during most of which time he was in a critical condition.

State Highway Patrolman J. E. Williamson testified that on January 18, 1962, he set up a road block at the intersection of Highway 5 and Highway 11 in Bibb County, Alabama, and checked all vehicles for weapons because a man had been shot with a rifle. At 5:00 a. m., he stopped a four-door 1959 white Ford automobile occupied by petitioner, who was a passenger, and one Olen Ray Loyd, who was the driver. Williamson, who found a shotgun and a small box of high

velocity shells in the automobile, made a record of his findings and allowed the automobile, which bore an Etowah County, Alabama, license tag, to proceed on its way. As the car was driven off, Williamson noticed that it had only one tail light burning. Later that day in Anniston, Alabama, he checked an automobile and identified it as the one in which petitioner and Loyd had been riding when they were stopped by him at the road block.

At approximately 8:00 a.m., January 18, 1962, after an alert for the car had been broadcast, petitioner and Loyd were stopped, but were not arrested, by a police officer in Ohatchee, Calhoun County, Alabama, and were taken by patrol officers to the State Highway Patrol office in Anniston, Alabama, where they were held for the Dallas County, Alabama, sheriff. There it was found that a Jefferson County, Alabama, license plate had been placed under the front floor mat on the driver's side of the car. This car, which was a white 1959 Ford Galaxie, the right tail light of which was disconnected, bore an Etowah County, Alabama, tag and had on its back window shelf an umbrella. Other articles, including three guns and shotgun shells, were also found in various parts of the car.

Petitioner and Loyd were taken from Anniston, Alabama, to Birmingham, Alabama, where they were turned over to the Sheriff of Dallas County, Alabama, who had warrants for their arrest. They were then taken to Selma, Alabama, and placed in the county jail.

The Ford automobile in which petitioner was riding when he was stopped in Calhoun County, Alabama, was brought to Montgomery, Alabama, and there examined by a State criminologist. At the trial a large number of pictures of the automobile and many articles, including two shotguns and a license plate, which were taken from the automobile, were introduced into evidence.

A shotgun shell hull, which had been fired from a gun found in petitioner's car, was found in the vicinity of the crime by local law enforcement officers and was introduced into evidence by the State.

The State of Alabama called Olen Ray Loyd as a witness against the petitioner. On the day preceding the petitioner's trial, a jury had found Loyd guilty of assault with intent to murder. He was asked twenty-one questions concerning the entire contents of a statement shown to have been made voluntarily to law enforcement officers at the Dallas County, Alabama, jail. He refused to answer these questions on constitutional grounds and refused to affirm or deny that he had made said statement.

According to Loyd's statement or confession, on the night of January 17, 1962, he and petitioner went from Gadsden, Alabama, to Birmingham, Alabama, where they were instructed to fire upon the tractors pulling Bowman Transportation Company trailers which were traveling from Birmingham through South Alabama, inasmuch as Teamsters Union, Local 612, of which they were members, was on strike against Bowman. In Birmingham, Loyd was given a Jefferson County, Alabama, license plate to place on his automobile and he was also furnished a tank full of gasoline, both by one Sam Webb, President of Teamsters Union, Local 612. Loyd and petitioner left Birmingham at about the same time that the trucks started their trip to New Orleans, Louisiana, and they saw these trucks several times, but did not fire upon them until they were in Dallas County, Alabama. At the time the shot which hit Warren and his tractor was fired, Loyd was driving the automobile and the gun was fired by petitioner.

A qualified criminalist, trained in firearms identification, testified that ammunition found in Loyd's car contained similar elements in the same proportions as the ammunition frag-

ments found inside the cab of Warren's tractor and in his body; that the shotgun shell hull found in the vicinity of the crime had been fired from a gun found in Loyd's car; and that test firings indicated that the shots which hit Warren's tractor had been fired from a distance of not greater than eight feet.

After Loyd left the witness stand, the State of Alabama called four law enforcement officers who testified that Loyd's statement was given and signed voluntarily in their presence.

Petitioner did not offer any evidence in his own behalf.

VI.

ARGUMENT

A.

The State prosecuting attorney may, without depriving the accused of due process of law, question an accomplice concerning the contents of a confession made by the accomplice to law enforcement officers.

In this case, Loyd, an accomplice, was convicted the day before the petitioner was put to trial. He was called as a witness against the petitioner.

In examining Loyd the prosecuting attorney confronted him with his purported written statement after he was declared a hostile witness and asked twenty-one questions concerning the contents of said statement. These questions covered the entire statement. Loyd refused to answer the questions invoking his privilege against self incrimination. See *Ex parte Loyd* (Ala.), 155 So. 2d 519.

As was held by the Court of Appeals of Alabama in this case, it is within the discretion of the trial court to allow a party to refresh the memory of a hostile witness by calling his attention to a prior statement.

Since Loyd's privilege against self incrimination was personal, the petitioner had no right to invoke such privilege. *Namet v. United States*, 373 U. S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278. Cf. *Beck v. Washington*, 369 U. S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98.

A witness who has been convicted of a crime arising out of the transaction in question may no longer claim the privilege against self incrimination and may be compelled to testify. *United States v. Cioffi*, 242 Fed. 2d 473; *United States v. Romero*, 249 Fed. 2d 371; and *United States v. Gernie*, 252 Fed. 2d 664, cert. denied, 356 U. S. 968, 78 S. Ct. 1006, 2 L. Ed. 2d 1073.

The petitioner in this case suggests that the prosecuting attorney knowingly called Loyd to the stand for the purpose of wringing from him a refusal to testify. It is respectfully submitted that the record in this case does not justify petitioner's position. Every trial attorney knows that it is impossible to predict the testimony of a convicted accomplice.

It should here be pointed out that the attorney representing the petitioner and Loyd at the time of the trial of the case at bar, while objecting to the use of Loyd's statement prior to the examination of the witness, did not object to the questions propounded to Loyd concerning the contents of said statement. After Loyd refused to answer all twenty-one questions, said attorney moved the trial court to allow Loyd to purge himself of possible contempt.

After Loyd left the witness chair the State examined two local law enforcement officers and an agent of the Federal Bureau of Investigation without objection. These witnesses testified that Loyd gave the statement, used by the prosecuting attorney, in their presence on January 20, 1962. The State

did not attempt to introduce said statement into evidence at the petitioner's trial.

In this state of the record, we respectfully submit that there was no denial of petitioner's right to due process of law. **Error cannot be predicated upon adverse rulings of the trial court where the specific grounds of objection are not apt, unless the evidence sought is inadmissible for any purpose.** *Ellis v. State*, 38 Ala. App. 379, 86 So. 2d 842; *Pope v. State*, 39 Ala. App. 42, 96 So. 2d 441; *Robinson v. State*, 40 Ala. App. 101, 108 So. 2d 188; and *Nichols v. State*, 267 Ala. 217, 100 So. 2d 750.

This Honorable Court has held that a state may regulate the procedure of its courts in accordance with its own concept of policy and fairness, unless it offends some principle of justice ranked as fundamental.

This Honorable Court has also held that the privilege against self incrimination is not inherent in the right to a fair trial and is, therefore, not protected by the due process clause of the Fourteenth Amendment to the Constitution of the United States. See *Adamson v. California*, 232 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903.

For the above reasons we respectfully submit that no principle of fundamental justice was offended by the rulings of the trial court in the instant case. We submit that the State of Alabama may examine a convicted accomplice concerning the contents of a prior written statement made by him without violating the due process clause of the Fourteenth Amendment to the Constitution of the United States.

B.

The petitioner was not denied due process of law because the Court of Appeals of Alabama refused to consider matters dehors the record and refused to allow an amendment to the record after it was filed in said Court. See *Wolfe v. North*

Carolina, 364 United States 177, 80 Supreme Court 1482, 4 L. Ed. 2d 1650.

In Alabama an appellant is charged with the duty of presenting a correct record to the appellate court. *Rushing v. State*, 40 Ala. App. 361, 113 So. 2d 527; and *Weldon v. State*, 21 Ala. App. 357, 108 So. 270.

A denial of due process of law is not shown in this case where the attorneys for the petitioner alleged that they did not know the contents of the record on appeal prior to the filing of said record in the Court of Appeals of Alabama (See petitioner's brief, page 12).

The judgment of the trial court in the case at bar was written by the trial judge and certified by him (R. pp. 6 and 7). For a full understanding of the reason for this procedure, see *Ex parte Loyd* (Ala.), 155 So. 2d 519.

Under the usual procedure in Alabama, the clerk of the circuit court prepares the formal judgment of conviction from minute entries after the jury has found the accused guilty and the judge has orally pronounced sentence. If the clerk of the court is authorized to prepare the formal judgment, we respectfully submit that the circuit judge may prepare such judgment without denying to the accused his right to due process of law.

The record filed in this Honorable Court does not support petitioner's allegation that Alabama provides no procedure for the correction of an erroneous record on appeal. Petitioner's motion in the Court of Appeals of Alabama, entitled, "Motion of Appellant to Strike Portions of the Transcript of Record, for the Discharge of Appellant, and for Alternative Relief," which is a part of the record in this Honorable Court, was denied because petitioner failed to allege or show that the formal judgment did not represent

what actually transpired. There was no allegation that the judgment entry was untrue.

Contrary to the argument found on pages 11 and 12 of petitioner's brief, petitioner was arraigned in open court upon the indictment charging the offense of assault with intent to murder (R. p. 6).

Where the affirmance of a conviction in a state court is rested upon an adequate ground under state criminal procedure, this Honorable Court has held that no question of the denial of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States is presented. *Edelman v. California*, 344 U. S. 357, 73 S. Ct. 293, 97 L. Ed. 387. Cf. *Hedgebeth v. North Carolina*, 344 U. S. 806, 68 S. Ct. 1185, 92 L. Ed. 1739.

For these reasons we respectfully submit that there was no denial of petitioner's right to due process of law in connection with his arraignment upon the indictment or the judgment of conviction entered against him.

VII

CONCLUSION

Premises considered, we respectfully submit that there was no denial of the petitioner's right to due process of law in this case. Therefore, the writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I, Paul T. Gish, Jr., one of the attorneys for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of September 1964, I served a copy of the foregoing brief and argument in opposition to petition for writ of certiorari on one of the attorneys for the petitioner, by mailing a copy in a duly addressed envelope, to said attorney of record as follows:

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Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term 1964

No. 313

JESSE ELLIOTT DOUGLAS, *Petitioner*

VS.

STATE OF ALABAMA, *Respondent*

PETITIONER'S BRIEF

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IN THE
Supreme Court of the United States

October Term

No. 313

JESSE ELLIOTT DOUGLAS, *Petitioner*

v.

STATE OF ALABAMA, *Respondent*

PETITIONER'S BRIEF

OPINION BELOW

The opinion of the Alabama Court of Appeals (R. 215-246) is reported at 163 So. 2d 477. The order of the Supreme Court of Alabama denying certiorari (R. 251) is reported at 163 So. 2d 496.

JURISDICTION

Petitioner contends that he has been deprived of his rights under the Constitution of the United States. Jurisdiction of this court is derived under 28 U.S.C. 1257 (c). The judgment of the Alabama Court of Appeals, affirming his conviction in the circuit court of Dallas County, Alabama, of assault with intent to murder, was rendered on October 8, 1963. (R. 209). The Supreme Court of Alabama denied certiorari on March 26, 1964, (R. 251) and the application for rehearing on April 30, 1964. (R. 252).

Petition for certiorari was filed in this court on July 22, 1964, and granted on October 12, 1964. (R. 253).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Section 1 of Amendment XIV to the Constitution of the United States which is as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED FOR REVIEW

Is the defendant in a criminal trial deprived of due process of law when the prosecutor knowingly calls an alleged accomplice to the stand to secure from him a refusal to testify and when his presence on the stand is used as a pretense for reading to the jury an alleged confession of the witness which is inadmissible against the defendant?

STATEMENT OF THE CASE

On January 18, 1962, Charles Layman Warren was driving a truck in a southerly direction on highway 5 near its intersection with highway 80 in Dallas County, Alabama. (R. 73-82). About 2:30 a.m. a white Ford with one occupant, wearing a white shirt, passed him traveling in the same direction. (R. 74, 88) The right tail light was out and it had a Jefferson County tag. (R. 74, 88) Mr. Warren was shot and injured a few minutes later as a white, but otherwise unidentified, automobile passed him traveling in the opposite direction. (R. 73, 88)

About 5:00 a.m. J. E. Williamson, a state highway patrolman, stopped a white Ford automobile driven by Olen Ray Loyd in which petitioner was a passenger at a roadblock at the intersection of highways 5 and 11 in Bibb County, Alabama. He searched the car and found a pump shotgun and some shells, but no automatic shotgun. (R. 93-101) Loyd and petitioner were traveling from the direction of Tuscaloosa and when released proceeded south on highway 5 toward the scene of the shooting. (R. 93-95)

Petitioner and Loyd were stopped and arrested by a policeman, Aaron Teague, in Ohatchee, Alabama, about 8:00 a.m. (R. 103-104) Upon searching the car he found a pump shotgun and some shells, but no automatic shotgun. (R. 105) Although he described his search as casual, he made petitioner and Loyd get out of the car and he looked under the seat. (R. 105) Mr. Teague was acting on radio instructions from the Highway Patrol to stop petitioner and Loyd, and he did not know why they were being held. (R. 105-106) When a highway patrolman arrived, he turned Loyd and petitioner over to him. (R. 103)

Mr. Teague then drove Loyd's car to the Highway Patrol station in Anniston, twenty-one or two miles away, and left it unguarded behind the station. (R. 107) W. R. Jones, Chief Investigator for the State of Alabama, whose office is in Montgomery (R. 111) went to Anniston sometime during January 18 and took possession of the car. (R. 113) When he searched it he found a J. C. Higgins pump shotgun in the trunk (Pl's Ex. 26, R. 153, 164, erroneously described as Exhibit 25 at R. 113), and a Winchester automatic shotgun (Pl's Ex. 27 R. 153, 164) underneath the back seat. (R. 113, 114)

Chief Jones drove Loyd's car to Birmingham and a

Captain Godwin drove it from Birmingham to Montgomery, where it was locked up at the Highway Patrol office. (R. 113) About 10:00 a.m. the next day it was carried to the patrol shop and turned over to Robert Finley, with the State Toxicology Department. (R. 175) Mr. Finley and Chief Jones searched the car again and found a rifle (Plaintiff's Ex. 25 R. 151) between the grill and radiator. (R. 114) The two shotguns were on the back seat. (R. 153) Mr. Finley testified that in his opinion a shotgun hull (Ex. 2 R. 136), which was found on highway 5 nine and one-half miles north of the scene of the shooting of Mr. Warren, was fired from the Winchester automatic shotgun. (R. 162) The state did not check the car or any of the weapons for fingerprints. (R. 177).

Chief Jones took custody of Loyd and petitioner in Anniston. Later in the day he carried them to Birmingham, and turned them over to Sheriff Clark (Sheriff of Dallas County). (R. 112) Sheriff Clark had a warrant which he read to them. (R. 112)

On Saturday, January 20, 1962, at about ten or eleven o'clock p.m., Loyd signed a statement at the Dallas County jail. (R. 132-134) The statement was identified as Ex. 1, but not offered in evidence. It is set out at R. 121-130. Six officials were present when it was signed, but Mr. Loyd's attorney was not. (R. 132-134) However, his attorney was at the jail. (R. 117)

The Dallas County grand jury indicted petitioner for assault with intent to murder Charles Warren on January 23, 1962. (R. 1) The only evidence submitted to the grand jury was the testimony of Sheriff Clark, a shotgun hull, and Loyd's confession. (R. 48-65) On January 29, 1962, Judge Hare admitted petitioner to bail in the amount of \$10,000. (R. 2)

On March 1, 1962, the jury returned a verdict of guilty against Loyd for assault with intent to murder, but he was not then sentenced or adjudicated. (R. 131). The same day petitioner's trial began. (R. 47)

During petitioner's trial the state called Loyd as a witness. (R. 118) After he was sworn, but before he was asked any questions, Mr. Esco, who was Loyd's attorney as well as petitioner's, objected to Loyd appearing on the stand. (R. 118) He stated Loyd had given notice of appeal and filed bond. The objection was overruled and Mr. Esco excepted. (R. 119)

Loyd answered his name, but to the question "Where is your home?" responded, "I refuse to answer on the grounds that any answer I give will tend to incriminate me." At the request of the prosecutor the court instructed Loyd that as a jury had determined his guilt he was required to answer. Loyd then stated he lived in Gadsden, Alabama. However, he again claimed his privilege not to testify to a question about his arrest. Petitioner's attorney objected, the court overruled and instructed Loyd to answer. Whereupon Loyd stated: "Not to my knowledge." (R. 119)

The same response was given to questions asking if he was in the Dallas County jail on January 20, 1962, and if he remembered talking to an FBI agent. (R. 120) The prosecutor requested the court to force Loyd to answer, Mr. Esco objected, and the court responded:

"I can't force the witness to answer. All I can do is to tell him that he is in contempt of this court. That's all I can tell him." (R. 120)

After Mr. Esco advised the court that he had instructed Loyd not to answer any questions, the judge, prosecutor and defense attorney had a conference outside the courtroom. Then Loyd and Esco left the room. When the witness returned to the stand, Esco said:

"At this time I move that this witness be excluded from the witness stand on the grounds that we have given notice of appeal in this case, that we are preparing a motion for a new trial, that he is privileged from constitutional law of the United States from testifying at this time and that he is claiming that right."

The court overruled and Mr. Esco excepted. (R. 120)

At the request of the prosecution the court declared Loyd a hostile witness and gave the state the privilege of cross-examination. (R. 121) Then the following occurred:

"Q. Is that your signature (showing witness signature on confession)?

A. I'm not sure.

Q. I will ask you if on January 20, 1962 —

Mr. Esco: (Interrupting) If your Honor please, I object to the reading of any document or purported confession, —

Mr. McLeod: (Interrupting) This is cross-examination.

The Court: Hostile witness. Overrule.

Mr. Esco: We except, if you please.

Q. I will ask you if on the night of January 20, 1962, in Selma, Alabama, in the Dallas County jail if you didn't make the following statement: (reading) 'I, Olen Ray Loyd, make the—'

Mr. Esco: (Interrupting) I object to this being read in the presence of the jury.

Mr. McLeod: You've already got an objection in there.

Mr. Esco: I object to this being read in the presence of the jury.

The Court: Overrule.

Mr. Esco: We except."

The prosecutor then read the statement to Loyd in the presence of the jury. (R. 121-128) After each paragraph he paused and asked Mr. Loyd if he had made that statement. In each instance Loyd refused to answer. Other than one comment by the judge the reading was not otherwise interrupted. The statement covers seven and one-half pages in the record. In the statement Loyd admitted participating in the crime but claimed that petitioner did the actual shooting. (R. 126)

The jury was excused and Mr. Esco again objected to the reading of the confession and moved to exclude it from evidence. When this was denied, petitioner's attorney moved for a mis-trial, which was also denied. (R. 129) The court instructed the prosecutor to prepare a contempt citation against Loyd and advised Mr. Esco that Loyd would remain in jail, "Just so long as he remain obdurate." (R. 129)

After the jury returned Loyd again stated he was not sure it was his signature on the confession. In response to a question did he make a statement, he replied: "Mr. McLeod, I'm not sure. I was under a lot of pressure then, and I don't know for sure." (R. 130) The jury was again excused and the court asked Loyd if he was willing to purge himself of contempt by testifying. He indicated in the affirmative. When the jury returned he again stated he was not sure it was his signature on the confession. (R. 130)

At this point, the court recessed the jury again, interrupted petitioner's trial, and sentenced Loyd to the maximum sentence of 20 years. His appeal bond was set at \$50,000. (R. 131) Petitioner's attorney made another motion for a mistrial, which was overruled. (R. 132)

The prosecution then called to the stand Chief Jones, Lt. Holmes, an investigator for the Alabama Department of Public Safety, and Robert L. Frye, an F. B. I. agent, each of whom identified the confession as having been signed by Loyd in the Dallas County jail. After Chief Jones had identified the confession and the prosecutor indicated he did not intend to introduce it in evidence, Mr. Esco moved to exclude it from evidence, which motion was overruled. (R. 132-133).

The jury found the petitioner guilty. (R. 202) He was sentenced by the court to the maximum sentence of twenty years and his appeal bond set at \$50,000.00. (R. 6) However, on March 15, 1962, the Court of Appeals of Alabama reduced the bond to \$7,500.00. (R. 206)

Petitioner filed a motion for new trial on March 30, 1962. (R. 20) Ground 101 (R. 30) was based on the prejudicial misconduct of the prosecutor. Grounds 102 thru 145 related to the actions of the Court and prosecutor while Loyd was on the stand. (R. 30-42) Ground 155 alleged error as petitioner had been denied due process under the state and federal constitutions. (R. 46) The motion was denied on July 12, 1962. (R. 46).

The Alabama Court of Appeals affirmed the judgment of the trial court on October 8, 1963. (R. 209) Application for rehearing was filed October 23, 1963, (R. 247) and denied November 12, 1963. (R. 247) Petition for Writ of Certiorari was filed in the Supreme Court of

Alabama on November 27, 1963, (R. 248) and denied on March 26, 1964, (R. 251) An application for rehearing (R. 251) was overruled on April 30, 1964, (R. 252) The order of this court granting Certiorari on October 12, 1964, limited the issue to the question set out under Questions Presented for Review (R. 253).

SUMMARY OF ARGUMENT

The question presented for review involves two rules of law, both of which apply to two factual situations. During petitioner's trial the prosecutor called to the stand an alleged accomplice, who refused to testify on the ground of self-incrimination. While the accomplice, Loyd, was on the stand, the prosecutor read, in the presence of the jury, a confession alleged to have been made by Loyd, implicating the petitioner as a participant in the crime. The confession was not admissible against petitioner and was not offered in evidence.

Petitioner contends that the calling of Loyd to the stand to secure from him a refusal to testify, and the reading of the confession constituted such prejudicial misconduct by the prosecutor as to deny petitioner a fair trial. The inferences created in the minds of the jury by each of these acts of the prosecutor added critical weight to the state's case in such a form as to effectively deny petitioner the right of cross-examination. Thus, petitioner was deprived of procedural due process.

The opinion of the Alabama Court of Appeals does not deal directly with any of these issues. Petitioner's contention that his rights were violated by the prosecutor calling Loyd to the stand was not discussed. It was merely stated in the opinion that Loyd's claim of immunity was

personal and he had the right to waive it. The court held that petitioner waived his rights relative to the reading of the confession by the failure of his attorney to object.

Petitioner's argument may be summarized as follows:

1. The holding that petitioner waived his rights as to the reading of the confession is not supported by the record. An examination of page 121 of the record reveals that the petitioner's attorney objected to Loyd's confession being read in the presence of the jury when the prosecutor first began reading. Petitioner continued to make objections until the prosecutor admitted adequate reservation of error. This court has a duty to make its own independent examination of the record to protect petitioner from any deprivations of his constitutional rights. *Napue v. Illinois*, 360 US 264. The record clearly shows the petitioner reserved his constitutional rights by making timely objection to the reading of the confession.

2. In *Mooney v. Holohan*, 294 US 103, the court enunciated the principle that prejudicial misconduct by the prosecutor deprives a defendant in a criminal trial of due process. The official position of a prosecutor gives him a unique influence over the jury. *Berger v. United States*, 295 US 78. That official position was abused by the prosecutor when he read Loyd's confession to the jury during petitioner's trial. The state contends that his action could be justified as an attempt to refresh Loyd's memory. However, the witness refused to testify on constitutional grounds. The contents of the confession which the prosecutor read had no relation to the questions he had previously asked Loyd. The prosecutor failed to follow the procedure prescribed in *Kissic v. State*, 266 Ala. 71, 94 So 2d 202, 67 ALR 2d 530, for refreshing the memory of a witness outside the hearing of the jury. Long after it

became clear the witness had no intention of answering the prosecutor persisted in reading the ten page document. The determination of the prosecutor to have the jury hear the contents of the inadmissible confession constituted such prejudicial misconduct as to deny petitioner due process.

3. In our system of jurisprudence the right of cross-examination is a vital feature for testing truth. *Green v. McElroy*, 360 US 474. It is a fundamental right which is protected from infringement by the Fourteenth Amendment. *Wilmer v. Committee*, 373 US 96; *In re Oliver*, 333 US 257. The reading of Loyd's confession by the prosecutor added critical weight to the prosecution's case against petitioner in a form which denied him the right of cross-examination. Regardless of the motives of the prosecutor, the use by him of the hearsay confession to obtain petitioner's conviction deprived petitioner of procedural due process.

4. The principle of *Mooney v. Holohan*, 294 US 103, also applies to the misconduct of the prosecutor in calling Loyd to the stand to secure from him a refusal to testify.

In *Kaplow v. State*, 157 So 2d 862 (Fla 1963) the court outlined five criteria for determining whether or not a prosecutor had deprived a defendant of a fair trial by calling a witness who refused to testify. The circumstances of this case meet each of these criterion: (a) because of Loyd's complicity with the activities of the petitioner, the inference drawn from his refusal to testify tended to prejudice petitioner in the eyes of the jury; (b) the prosecutor had no reason to believe Loyd would testify; (c) as Loyd's conviction in his companion case was not final, he had the right to refuse to testify. *State v. Johnson*,

77 Idaho 1, 287 P 2d 425, 51 ALR 2d 1386; (d) petitioner's attorney promptly objected to Loyd being called to the stand; (e) the court failed to instruct the jury not to draw any inferences against petitioner because of Loyd's refusal to testify.

As no inference could be made against Loyd for his refusal to testify, *Slochower v. Board of Higher Ed. of City of N. Y.*, 350 IJS 551, the misconduct of the prosecutor in creating an inference by the jury against petitioner deprived petitioner of due process.

5. The implications from Loyd's refusal to testify added to the state's case against petitioner and are far beyond the reach of effective cross-examination. *Fletcher v. United States*, 332 F 2d 724 (CA-D.C.). Petitioner's conviction based on inferences which the jury may have drawn from this spectacle is a denial of due process.

ARGUMENT

1. Petitioner Reserved His Constitutional Rights By Making Timely Objection To The Prosecutor Reading Loyd's Confession To The Jury.

The portion of the opinion of the Alabama Court of Appeals holding that petitioner waived his rights relative to the prosecutor reading Loyd's confession is as follows:

"After the solicitor read portions to him and Loyd began claiming immunity for self-incrimination throughout the twenty-one questions, Douglas' counsel stopped objecting.

"In this state of the record, even though it might be claimed that the repeated and cumulative use of the confession might have been an indirect mode of getting the inadmissible confession in evidence, yet the failure

to object was waiver. There must be a ruling sought and acted on before the trial judge can be put in error. Here there was no ruling asked or involved as to the questions embracing the alleged confession." (R. 244).

The holding of a waiver based on failure to object is not supported by the record. This court has a duty to make its own independent examination of the record to protect against deprivations of the constitution. *Napue v. Illinois*, 360 US 264; *Jacobellis v. Ohio*, 84 S Ct 1676. When Mr. McLeod, the prosecutor, first began reading from the confession, the following occurred:

"Q. I will ask you if on January 20, 1962 - - -

Mr. Esco: (Interrupting) If your Honor please, I object to the reading of any document or purported confession, - - -

Mr. McLeod: (Interrupting) This is cross-examination.

The Court: Hostile Witness. Overrule.

Mr. Esco: We except, if you please.

Q. I will ask you if on the night of January 20, 1962, in Selma, Alabama, in the Dallas County jail if you didn't make the following statement: (reading) "I, Olen Ray Loyd, make the _____."

Mr. Esco: (Interrupting) I object to this being read in the presence of the jury.

Mr. McLeod: You've already got an objection in there.

Mr. Esco: I object to this being read in the presence of the jury.

The Court: Overrule.

Mr. Esco: We except."

(R. 121).

The record is clear that the defendant's attorney continued the objection until the prosecutor admitted adequate reservation of error. To have made additional objections would have been useless and an affront to the dignity of the court. The finding by the Alabama Court of Appeals that the defendant's attorney failed to object is clearly contrary to the record.

2. The Misconduct By The Prosecutor In Reading Loyd's Confession To The Jury Deprived Petitioner Of Due Process.

The principle is well settled that where misconduct on the part of the prosecutor deprives the defendant in a criminal case of a fair trial, the defendant has been denied due process of law in violation of the Fourteenth Amendment. The rule was first enunciated in *Mooney v. Holohan*, 294 US 103. Through the years this principle has been extended to various forms of prosecutorial misconduct.¹

Mr. Justice Douglas, speaking for the court in *Brady v. Maryland*, 373 US 83 (1963), said:

"The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor, but avoidance of an unfair trial to the accused."

Because of the official position of the prosecutor, his actions have a special effect upon the jury. When he uses unfair methods and plays upon the prejudice of the jury to obtain a conviction, the defendant is deprived of a fair trial. In *Berger v. United States*, 295 US 78, the court said:

¹See *Napue v. Illinois*, 360 US 264, for citations of examples of this development.

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The court in *Powell v. Wiman*, 287 F 2d 275 (CA 5), stated that the above quotation is equally applicable to state prosecuting attorneys.

The actions of the prosecutor in the present case reveal a "complete" disregard for the rights of both the petitioner and Mr. Loyd, who was called as a witness. After Loyd had invoked his constitutional right not to testify, the prosecutor continually brow-beat him. On one occasion he requested the court to force him to testify. (R. 120) When Loyd refused to respond to his questions about the confession, he merely read it to the jury. (R. 121-129)

Because he knew the confession was not admissible against the petitioner, the prosecutor did not offer it. (R. 132) However, in order to insure that the jury got the full prejudicial effect of the confession, after he had read it, he called three officials to the stand who testified they saw Loyd sign the statement. (R. 132-136)

The Alabama Court of Appeals held that the reading of the confession was permissible to refresh Loyd's mem-

ory. This holding is in direct conflict with the Alabama Supreme Court holding in the case of *Kissic v. State*, 266 Ala. 71, 94 So 2d 202, 67 ALR 2d 530, where the court reversed a conviction because the solicitor was allowed to refresh the memory of a witness by playing a recording within the hearing of the jury. The court said:

"If the purpose of playing the record was to let the witness hear it, that result could have been achieved out of the hearing and presence of the jury. It is obvious from reading the transcript that the state's purpose in having the record played was to have the jury hear it and impeach the witness."

The Alabama Court of Appeals attempted to distinguish the *Kissic* case because there a recording was involved and here a written statement. However, the court in *Kissic* suggested an alternative to playing the recording outside the presence of the jury: the recording could have been transcribed and the witness allowed to read it silently. It is the hearing by the jury of the prejudicial statement that violates petitioner's rights. The distinction drawn by the Alabama Court of Appeals is artificial to the point of being ludicrous.

In *People v. Thomas*, 359 Mich 257, 102 SW 2d 475, the court held that the reading of a lengthy hearsay statement by the prosecutor in the presence of the jury under the pretense of refreshing the recollection of the witness violated the defendant's rights under both the state and federal constitutions. The court said:

"If, in truth, it is the desire of counsel merely to 'refresh' the recollection of a witness it may be done by permitting the witness to read the document intended to trigger the memory, under which procedure, of course, its content does not go before the jury, or to withdraw

the jury and read the statement aloud, the procedure necessarily employed when the witness is blind or illiterate. Either procedure accomplishes the refreshing of memory, if that is, in truth, the purpose, and that without compromising the fundamental guarantees of the citizen accused of crime."

The prosecutor's motive in reading the confession is clear. It was neither to impeach the witness (which is also improper) nor refresh his recollection. He had not testified as to anything to be impeached. What specific facts could the prosecutor have desired to refresh in his memory? It is true that after the court had ordered him to testify in spite of his claim of privilege, he was evasive in response to questions about his arrest, incarceration, and the signature on the confession. However, the confession makes no reference to his being jailed and only one small reference to his arrest. (R. 127) It is inconceivable that the prosecutor could have thought that the reading of the ten page statement would have resulted in the witness providing any additional testimony. In any event the prosecutor had ample, uncontested evidence that Loyd had been arrested, jailed in Dallas County, and signed the statement.

If the prosecutor had wanted only to refresh Loyd's memory why was it necessary to read the statement in front of the jury? He could have followed either procedure prescribed in *Kissic*—merely shown the document to Loyd for him to look at and read silently, or ask that the jury be excused before reading it aloud. His insistence on reading the document in front of the jury, over the objection by the petitioner's attorneys, clearly shows it was his intention for the jury to hear the contents of the confession.

After the prosecutor began reading the confession, para-

graph by paragraph, and Loyd repeated his refusal to testify on constitutional grounds, any possible claim of refreshing his memory ceased. The ensuing charade served no purpose but to allow the jury to hear the remainder of the confession. It was then clear that Loyd did not intend to answer. The court in *State v. Dinsio*, 200 NE 2d 467 (Ohio 1964) held that as the prosecutor had reason to believe a witness would testify, his refusal to testify was not reversible error. However, error was committed when the prosecutor persisted in asking questions after the witness had invoked his rights not to testify. In *Namet v. United States*, 373 US 179, Justice Black in his dissenting opinion said:

"I believe it was error for the trial court to permit the prosecuting attorney in the presence of the jury to ask questions which he well knew the witness would refuse to answer on the grounds of self-incrimination."

Even though the confession was not introduced in evidence the state depended heavily upon it for the conviction. Except in the confession the only reference to petitioner in the evidence was his identification as a passenger in Loyd's car on two occasions, both several hours after the shooting. Except in the confession he was not connected with any of the many exhibits introduced by the state. Except in the confession, there is no evidence that petitioner ever had the gun in his possession that the state claims was used in the shooting. In the narration of facts in the state's brief in the Alabama Court of Appeals the details of the confession were recited as if they were in evidence. Even Judge Cates in writing the opinion for the Alabama Court of Appeals referred to a change in license plates as evidence against the defendant (R. 245), when it was not referred to anywhere in the record except in the confession.

The prosecutor has misused his office. No conclusion can be drawn from his actions except that he was bent upon obtaining a conviction—by fair means or foul. The intentional use by him of the illegal evidence to obtain a verdict effectively deprived the defendant of the rudimentary demands of justice.

3. *As Petitioner Was Deprived Of The Right To Cross-Examine The Implications Of Loyd's Confession He Was Denied Of Due Process*

The petitioner contends in the foregoing section that the prosecutor deprived him of due process of law by intentionally and knowingly reading Loyd's confession to the jury to obtain a conviction on evidence he knew to be inadmissible. However, even if it were done innocently or ignorantly, he deprived petitioner of due process by use of the confession under circumstances where the petitioner was denied the right of cross examination.

The Sixth Amendment right to confrontation, which includes the right of cross-examination, has ancient roots and the court is zealous to protect these rights from erosion. *Greene v. McElroy*, 360 US 474. In *Anderson v. United States*, 318 US 350, the court held that the use of inadmissible confessions in a conspiracy case constituted reversible error, even for those defendants against whom they were not admitted. Although this court has never specifically held that the states are bound by the federal requirements of confrontation, in *Snyder v. Massachusetts*, 291 US 97, the court assumed that the privilege is reinforced by the Fourteenth Amendment.

The trend in recent cases has been toward the position taken by Justice Douglas in his dissent in *Poe v. Ullman*, 367 US 497, that the Fourteenth Amendment incorporated

all of the first eight amendments. See the *Gitlow Doctrine Down To Date* by Paul C. Bartholomew, American Bar Journal, Vol. 50, No. 2, p. 139. In *Malloy v. Hogan*, 378 US 1, the court held the federal rules protecting the individual from self-incrimination under the Fifth Amendment are applicable to the states under the Fourteenth. The right to counsel provided by the Sixth Amendment is "fundamental and essential to a fair trial" and is made obligatory upon the states by the Fourteenth Amendment. *Gideon v. Wainwright*, 372 US 335.

In *Wilmer v. Committee*, 373 US 96, the court held that a state could not deny a license to an applicant to the bar without a hearing and an opportunity to confront witness who impugned his good character. Justice Douglas speaking for the court said:

"We think the need for confrontation is a necessary conclusion from the requirements of procedural due process in a situation such as this."

Justice Black in the opinion for the court in *In re Oliver*, 333 US 257, described the right to examine the witnesses against him as one of the minimum requirements of the basic rights under our system of jurisprudence.

The highest courts of several states have indicated that the right of cross-examination is essential to due process under the federal constitution. In *Pettit v. Rhay*, 62 W 2d 515, 383 P 2d 899, the court was limited to a federal question on a habeas corpus. The court said:

"In the case at bar, no meaningful cross examination of the complaining witness could be made at all and this was through no fault of the accused. To convict the accused and sentence him to a maximum term of twenty years, confinement in the state penitentiary upon the uncross-examined testimony of a fifteen-year-old girl

is to deprive him of that fundamental fairness in the conduct of his trial which is guaranteed him by the applicable provisions of both the state and federal constitutions."

The court in *People v. Thomas*, 359 Mich 257, 102 SW 2d 475, said:

"The prosecutor was permitted to place before the jury statements most damaging to the defendant, made in the late hours of the night by a woman who had undergone a shattering emotional experience, when, obviously, the defendant was not present and thus could neither confront nor cross-examine his accuser. Such procedure is forbidden by both the State and the Federal Constitutions."

See also *Baker v. State*, 150 So 2d 729, (Fla 1963), *Young v. State*, 890 O. Crim 395, 208 P 2d 1141.

However, in *Stein v. New York*, 346 US 156, the court held that the introduction in a joint trial of confessions of two defendants did not deprive a third defendant of due process. The court in an opinion by Justice Jackson said:

"Basically, Wissner's objection to the introduction of these confessions is that as to him they are hearsay. The hearsay-evidence rule, with all its subtleties, anomalies and ramifications, will not be read into the Fourteenth Amendment.***"

"Perhaps the methods adopted by the New York courts to protect Wissner against any disadvantage from the State's use of the Cooper and Stein confessions were not the most effective conceivable. But its procedure does not run afoul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give surer promise of protection to the prisoner at the bar."

Even if the states are not bound by the federal hearsay rules in their entity, the Fourteenth Amendment proscribes that the state must provide some procedure to

protect an accused from the prejudicial use of evidence from which he is denied the right of cross-examination. The rule in the Kissic case provides such protection in Alabama. Legitimate use of hearsay statements can be made outside the hearing of the jury. The problem presented by the joint trial in *Stein* is not present in Alabama as defendants in criminal courts are entitled to separate trials. *Code of Alabama*, Title 15, Section 319.

The court in *Greene vs. McElroy*, 360 US 474, quoted from 5 *Wigmore on Evidence* (3d ed. 1940) § 1367, as follows:

"For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience."

In addition to testing the truthfulness and worthiness of the statements in the confession pertaining to petitioner, adequate cross-examination would have brought to light the circumstances under which the statement was given. At the time he made the confession Loyd had been kept in a super-heated cell (called the "hot box") for several days. He had been illegally detained without a hearing to set bond, illegally moved from county-to-county to make it difficult for his attorneys to locate him, and held incommunicado. His attorney and wife were kept waiting for several hours outside in the jail lobby and were not allowed to see him until he made the statement. See *Loyd v. State*, Ala. App. (decided 10-8-63). Loyd

now has a petition for certiorari pending in the Alabama Supreme Court. In view of the striking similarity to the circumstances with those in *Escabedo v. Illinois*, 84 S Ct 1758, (1964), a reversal of his conviction is anticipated. See also *Massiah v. United States*, 84 S Ct 1199 (1964) and *People v. Dorado*, 40 Cal R 264, 394 P 2d 952.

It would be a travesty upon justice if a statement made by Loyd under such circumstances that it could not be used against him, could be used to convict petitioner. See *McClure v. State*, 95 Tex Crim 53, 251 SW 1099.

The trial court allowed the state to use Loyd's confession to bolster its case against the petitioner. The manner in which it was done denied petitioner the right to confront and cross-examine the witness against him. Under these circumstances the petitioner was denied the essential elements of a fair trial.

4: *The Misconduct Of The Prosecutor In Calling Loyd To The Stand To Secure From Him A Refusal To Testify Deprived Petitioner Of Due Process.*

The principle of *Mooney v. Holohan*, 294 US 103, applies to the misconduct of the prosecutor in calling a witness to the stand for the purpose of forcing him to invoke his constitutional rights against self-incrimination as well as to the reading of the confession. In *De Gesualdo v. People*, 147 Colo 426, 364 P 2d 874, the court reversed the conviction because of the misconduct of the prosecutor in calling a witness to the stand who refused to testify. The court said:

"A district attorney, although in a sense a partisan, is a judicial officer sworn to uphold the constitution and obligated to refrain from invalid conduct creating an atmosphere prejudicial to the substantial rights of the defendant."

The court in *Kaplow v. State*, 157 So 2d 862, (Fla 1963) quoted from *Annotation*, 86 ALR 2d 1443, the circumstances under which the defendant is deprived of a fair trial, as follows:

" . . . (1) that the witness appears to have been so closely implicated in the defendant's alleged criminal activities that the invocation by the witness of a claim of privilege when asked a relevant question tending to establish the offense charged will create an inference of the witness' complicity, which will, in turn, prejudice the defendant in the eyes of the jury; (2) that the prosecutor knew in advance or had reason to anticipate that the witness would claim his privilege, or had no reasonable basis for expecting him to waive it, and, therefore, called him in bad faith and for an improper purpose; (3) that the witness had a right to invoke his privilege; (4) that the defense counsel made timely objection and took exception to the prosecutor's misconduct; and (5) that the trial court refused or failed to cure the error by an appropriate instruction or admonition to the jury."

The courts of Texas have been particularly vigorous in protecting a defendant from the implication of a witness refusal to testify. *Washburn v. State*, 164 Tex Crim 448, 299 SW 2d 706; *Rice v. State*, 121 Tex Crim 68, 51 SW 2d 364; *McClure v. State*, 95 Tex Crim 53, 251 SW 1099; *Garland v. State*, 51 Tex Crim 643, 104 SW 898.

The Alabama Court of Appeals merely evaded the issue in petitioner case with the following language:

"Douglas can take nothing from the ruling of the court of Loyd's claim of immunity from self-incrimination. The privilege is personal. Had Loyd waived it, Douglas would have been confronted with testimony legal to use against him. *Beauvoir Club v. State*, 148 Ala 643, 42 So 1040; 8 Wigmore, Evidence (McNaughton rev. 1961), § 2259."

(R. 239)

The petitioner's submits that where all of the circumstances exist as quoted previously from *Kaplo v. State*, 157 So 2d 862, (Fla 1963), the prosecutor has committed such gross misconduct as to deprive the defendant of a fair trial and due process of law under the principle of *Mooney v. Holohan*, 294 US 103. In the present case each of these circumstances exist and will be discussed in the order listed.

(1) Loyd was an alleged accomplice in the commission of the crime for which the defendant was accused. He had made a confession in which he claimed the defendant did the actual shooting. Other than the confession, which was read to the jury but not admitted in evidence, the only evidence against the petitioner was a number of exhibits taken from Loyd's car and the identification of petitioner as passenger in Loyd's car on two occasions several hours after the shooting. The refusal of Loyd to testify on the grounds that his testimony may incriminate him necessarily implied in the minds of the jurors that it would also incriminate petitioner.

(2) The prosecutor has not claimed that he had any reasonable basis to expect Loyd to testify. He had every reason to anticipate that he would refuse. Loyd had repudiated his confession and refused to testify on his own behalf the previous day. After Loyd had been called and sworn, but before he had been asked any questions, his attorney objected to his appearing on the stand and stated that he had given notice of appeal of Loyd's conviction on the previous day. In *De Gesualdo v. People*, 174 Colo 426, 364 P 2d 874, the court recited similar occurrences and said:

"It is apparent that the district attorney could not have possibly entertained a good faith belief that Ciccarelli would testify if called and thus the inference is that this was a studied attempt to bring to the attention

of the jury his refusal to testify and his claim of the 'Fifth Amendment'."

Had the prosecutor only wanted to determine if Loyd would testify, he could have done this outside the presence of the jury, by analogy to the *Kissic* rule.

(3) On page 8 of its brief, in reply to the petition for certiorari, the respondent cites three cases for the proposition that one who has been convicted² may be compelled to testify. *United States v. Cioffi*, 242 F 2d 475 (CA 2); *United States v. Gernie*, 252 F 2d 664 (CA 2), certiorari denied 356 US 968; *United States v. Romero*, 249 F 2d 372 (CA 2). None of these apply to Loyd. At the time he was called to the stand no judgment of conviction had been entered against him. Judgment and sentence was rendered against him after he refused to testify. (R. 131)

The witnesses in both *Cioffi* and *Gernie* had pleaded guilty and been sentenced. The witness in *Romero* had been convicted and sentenced in juvenile proceedings. The court in *Cioffi* said that the termination of the proceeding against the witness was "crucial".

Prior to being called to the stand, Loyd had given notice of his intent to appeal from the verdict of the jury. *Ex parte Loyd*, 155 So 2d 519 (Ala). Although the Alabama Court of Appeals affirmed his subsequent conviction on appeal, the case is now pending on an application for certiorari to the Alabama Supreme Court. In view of this Court's recent holdings in *Escobedo v. Illinois*, 84 S Ct 1758, and *Massiah v. United States*, 84 S Ct 1199, it is likely certiorari will be granted and Loyd given a new

²"This term has a definite signification in law, and means that a judgment of final condemnation has been pronounced against the accused. *Gallagher v State*, 10 Tex App 469". Black's Law Dictionary—Third Edition, p. 432.

trial. See also, *People v. Dorado*, 40 Cal R 264, 394 P 2d 952.

In *State v. Johnson*, 77 Idaho, 287 P 2d 425, 51 ALR 2d 1386, certiorari denied 350 US 1007, the court held that a defendant in a companion case who had been convicted, but had given notice of appeal, could not be compelled to testify. The court said:

"His testimony or aspects thereof, if given as a witness at appellant's trial, might well react adversely and tend to incriminate him, should he be granted a new trial upon disposition of his pending appeal. Under the circumstances the trial court properly allowed Fedder to assert his constitutional immunity." See also, *Mills v. United States*, 281 F 2d 736 (CA 4).

Even if his conviction was final, he still had the right to refuse to testify. Had he testified, he may have been forced to involve himself in crimes, other than the one for which he was convicted. He was subsequently indicted, along with twenty other defendants, for violation of 18 USC 1951 and for conspiring to violate 18 USC 1281 and 18 USC 1951.

The indictment not only indicates that his testimony may have been used against him in the federal prosecution (from which he is protected by this court's ruling in *Murphy v. Waterfront Commission*, 378 US 52), but also implicates him in several enumerated overt acts which could constitute violations of state laws. At the same time Loyd gave the state authorities the statement used in this case, he also gave an agent of the F.B.I. a more comprehensive statement. Any testimony by Loyd about the confession may have led to disclosures of associations and acts implicating him in other crimes, both state and federal. *Malloy v. Hogan*, 378 US 1.

(4) The petitioner's attorney, who was also Loyd's attorney, objected to the witness appearing on the stand before any questions had been asked of him. (R. 118) He excepted to the court's adverse ruling. (R. 119) He later made a motion that the witness be excluded from the stand, which was also overruled. (R. 120).

(5) The trial court not only failed to give the jury appropriate instructions, but by his rulings and comments gave the jury reason to assume the refusal of the witness to testify should be used against the defendant. On several occasions he ordered Loyd to testify. (R. 119-129). At the request of prosecutor he declared Loyd a hostile witness because of his invocation of his constitutional rights. (R. 121) After the prosecutor had completed the reading of the confession and Loyd still refused to testify, the court excused the jury and ordered the prosecutor to file contempt proceedings. The jury was brought back in and another attempt was made to coerce Loyd into testifying. When he again refused the court excused the jury again, interrupted petitioner's trial, and sentenced Loyd to the maximum sentence for his conviction the preceding day. The court also increased Loyd's appeal bond from \$7,500. to \$50,000. The jury could not help but be aware of the judge's attitude toward Loyd. The court's disapproval of Loyd invoking his rights against self-incrimination reacted adversely to the petitioner in the minds of the jury. The court approved the misconduct of the prosecutor—he even assisted it. This in itself is sufficient to prejudice the jury and deprive petitioner of a fair trial by an impartial jury.

The circumstances in the present case should be distinguished from the situation in *Namet v. United States*, 373 US 179, where the witness willingly testified, but

merely refused to answer isolated questions in the long interrogation. See *Fletcher v. United States*, 332 F 2d 724, (CA-D.C.).

In *Slochower v. Board of Higher Ed. of City of N. Y.*, 350 US 551, the court held that a statute which automatically discharged a teacher who invoked his right against self-incrimination violated due process. The court condemned the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. If no inference can be made against the one who invokes the privilege, the use of such an inference against another just as effectively violates due process as to him.

However, it would be too much to expect a lay jury not to conclude that Loyd's refusal to testify should not adversely affect petitioner. With this knowledge, the prosecutor misused the powers of his office in placing Loyd on the stand to wring from him a refusal to testify. This prosecutorial misconduct, under the circumstances in the present case, prejudiced the jury and denied petitioner a fair trial.

5. As Petitioner Was Deprived Of The Right To Cross-Examine The Implications Of Loyd's Refusal To Testify He Was Denied Due Process.

All of the state cases involving a prejudicial trial because of the refusal of a state's witness to testify proceed on the theory of prosecutorial misconduct. However, the implications from Loyd's refusal to testify were beyond effective cross-examination. The rules of law discussed with reference to the right to cross-examine the contents of the confession, apply equally to the putting of Loyd on the stand.

The failure of the right to cross-examine the implications from the invocation of constitutional rights was discussed in *Namey v. United States*, 373 US 179. In *Fletcher v. United States*, 332 F 2d 724. (CA-DC), the court reversed the conviction because prosecutor called an accomplice to the stand and was allowed to ask him several questions, to each of which he refused to answer. The circumstances outlined by the court were similar to the questioning of Loyd, except the court gave no cautionary instructions to the jury. The court said:

"We are of opinion that in the circumstances of this case, viewed in their entirety, inferences from Anderson's refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced Fletcher. They affect his substantial rights."

CONCLUSION

Petitioner submits that because of the misconduct of the prosecutor and the denial to him of the right to cross-examine the witnesses used against him, he had been denied a fair trial and due process of law. The judgment of conviction against him should be reversed and he should be granted a new trial.

Respectfully submitted,

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FILED

JAN 15 1965

IN THE U.S.

JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 313

JESSE ELLIOTT DOUGLAS,

Petitioner

V.

STATE OF ALABAMA,

Respondent

**ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF ALABAMA
BRIEF AND ARGUMENT OF RESPONDENT**

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 313

JESSE ELLIOTT DOUGLAS,

Petitioner

v.

STATE OF ALABAMA,

Respondent

**BRIEF AND ARGUMENT OF
RESPONDENT ON THE MERITS**

I

OPINIONS BELOW

The opinion of the Court of Appeals of Alabama is reported as *Jesse Elliott Douglas v. State of Alabama*, 2nd Division 61, 163 So. 2d 477.

The case was decided on October 8, 1963. An application for rehearing in the Court of Appeals of Alabama was denied without opinion on November 12, 1963. A petition for writ of certiorari was filed in the Supreme Court of Alabama and the writ was denied on March 26, 1964. *Jesse Elliott Douglas v. State of Alabama*, 2nd Division 453, 163 So. 2d 496. An application for rehearing in the Supreme Court of Alabama was denied without opinion, on April 30, 1964.

JURISDICTION

The petitioner has been granted a writ of certiorari from this Honorable Court to review the judgment of the Court of Appeals of Alabama, rendered October 8, 1963, rehearing denied November 12, 1963, under the provisions of Title 28, Section 1257(c), United States Code, Judiciary and Judicial Procedure.

QUESTION PRESENTED

This Honorable Court has granted a writ of certiorari to consider the following issue:

Whether the petitioner, who stands convicted in a State court of assault with intent to murder, was denied due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States by virtue of the fact that the prosecutor was allowed to question an accomplice as a witness for the State at petitioner's trial concerning the contents of a written statement made by the accomplice to law enforcement officers.

CONSTITUTIONAL PROVISION INVOLVED

Petitioner alleges a denial of rights guaranteed to him by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was indicted by a Grand Jury of Dallas County, Alabama, for the offense of assault with intent to murder.

Title 14, Section 38, Code of Alabama 1940, as Recompiled 1958. After hearings thereon, petitioner's motion to quash the indictment and his motion for a continuance were overruled. Upon arraignment a plea of not guilty was entered and trial was had before a jury which returned a verdict of guilty as charged in the indictment. In accordance with the verdict of the jury, the trial court rendered an adjudication of guilt and sentenced petitioner to imprisonment for a period of twenty years, whereupon notice of appeal was given. Subsequently, the trial court overruled petitioner's motion for a new trial.

Prior to the introduction of any evidence on the merits, hearings were conducted on petitioner's motion to quash the indictment and on his motion for a continuance. The State pleaded the general issue to the motion to quash, and the testimony of three grand jurors who returned the indictment was introduced. The testimony of these witnesses tended to show that, when the case was presented to the grand jury, the Sheriff of Dallas County, Alabama, testified before said jury and there was exhibited a statement which had been signed voluntarily by an alleged accomplice of petitioner, together with a shotgun shell hull. Petitioner's attorney was not allowed to inquire into the details of the evidence presented to the grand jury.

The only evidence introduced at the hearing on the motion for a continuance were several newspaper articles in which were reported the trial of petitioner's alleged accomplice.

This case arises out of the shooting of a truck driver in Dallas County, Alabama, near the intersection of Highway 5 and Highway 80, at approximately 2:30 a.m., January 18, 1962.

The evidence tends to show that about midnight on January 17, 1962, one C. L. Warren, who was employed by West

Brothers Motor Express and who was a member of Teamsters Union, Local 612, left Birmingham driving a Bowman Transportation Company tractor-trailer type transport truck. He was headed South through Alabama, his destination being New Orleans, Louisiana. There were other trucks making this same trip, and one Edward Gorff was driving a truck immediately behind the one driven by Warren.

After leaving a truck stop near Centreville, Alabama, Warren and Gorff noticed a 1959 Ford Galaxie, which carried a Jefferson County, Alabama, license plate, as it passed them, headed South in the same direction as their two trucks. Gorff noticed that this Ford's right tail light was not burning and that a black object lay on its back window shelf. A short time after this car had passed the trucks, a car of the same description was seen by Gorff headed North toward Warren and him. As this car met Warren's truck, there were fired from the car shots which hit the truck and also hit Warren in the arm and in the chest. Gorff stopped his truck to assist Warren and to see that he received medical attention. Warren was hospitalized for twelve days, during most of which time he was in a critical condition.

After the crime has been committed, State Highway Patrolman J. E. Williamson set up a road block at the intersection of Highway 5 and Highway 11 in Bibb County, Alabama, and examined all vehicles for weapons. At 5:00 a.m., on January 18, 1962, he stopped a four-door 1959 white Ford automobile occupied by petitioner, who was a passenger, and one Olen Ray Loyd, who was the driver. Williamson, who found a shotgun and a small box of high velocity shells in the automobile, made a record of his findings and allowed the automobile, which bore an Etowah County, Alabama, license tag, to proceed on its way. As the car was driven off, Williamson noticed that it had only one tail light burning. Later that day in Anniston, Alabama, he examined an auto-

mobile and identified it as the one in which petitioner and Loyd had been riding when they were stopped by him at the road block.

At approximately 8:00 a.m., January 18, 1962, after an alert for the car had been broadcast, petitioner and Loyd were stopped by a police officer in Ohatchee, Calhoun County, Alabama, and were taken by patrol officers to the State Highway Patrol office in Anniston, Alabama, where they were held for the Dallas County, Alabama, sheriff. There it was found that a Jefferson County, Alabama, license plate had been placed under the front floor mat on the driver's side of the car. This car, which was a white 1959 Ford Galaxie, the right tail light of which was disconnected, bore an Etowah County, Alabama, tag and had on its back window shelf an umbrella. Other articles, including three guns and shotgun shells, were also found in various parts of the car.

Petitioner and Lloyd were taken from Anniston, Alabama, to Birmingham, Alabama, where they were turned over to the Sheriff of Dallas County, Alabama, who had warrants for their arrest. They were then taken to Selma, Alabama, and placed in the county jail.

The Ford automobile in which petitioner was riding when he was stopped in Calhoun County, Alabama, was brought to Montgomery, Alabama, and there examined by a State criminalist. At the trial a large number of pictures of the automobile and many articles, including two shotguns and a license plate, which were taken from the automobile, were introduced into evidence.

A shotgun shell hull, which had been fired from a gun found in petitioner's car, was found in the vicinity of the crime by local law enforcement officers and was introduced into evidence by the State.

The State of Alabama called Olen Ray Loyd as a witness against the petitioner. On the day preceding the petitioner's trial, a jury had found Loyd guilty of assault with intent to murder. He was asked twenty-one questions concerning the entire contents of a statement shown to have been made voluntarily to law enforcement officers at the Dallas County, Alabama, jail. He refused to answer these questions on constitutional grounds and refused to affirm or deny that he had made said statement.

According to Loyd's statement, on the night of January 17, 1962, he and petitioner went from Gadsden, Alabama, to Birmingham, Alabama, where they were instructed to fire upon the tractors pulling Bowman Transportation Company trailers which were traveling from Birmingham through South Alabama, inasmuch as Teamsters Union, Local 612, of which they were members, was on strike against Bowman. In Birmingham, Loyd was given a Jefferson County, Alabama, license plate to place on his automobile and he was also furnished a tank full of gasoline, both by one Sam Webb, President of Teamsters Union, Local 612. Loyd and petitioner left Birmingham at about the same time that the trucks started their trip to New Orleans, Louisiana, and they saw these trucks several times, but did not fire upon them until they were in Dallas County, Alabama. Loyd was driving the automobile at the time the petitioner fired the shot which hit Warren and his tractor.

A qualified criminalist, trained in firearms identification, testified that ammunition found in Loyd's car contained similar elements in the same proportions as the ammunition fragments found inside the cab of Warren's tractor and in his body; that the shotgun shell hull found in the vicinity of the crime has been fired from gun found in Loyd's car; and that test firings indicated that the shots which hit Warren's

tractor had been fired from a distance of not greater than eight feet.

After Loyd left the witness stand, the State of Alabama called four law enforcement officers who testified that Loyd's statement was given and signed voluntarily in their presence.

Petitioner did not offer any evidence in his own behalf.

VI

ARGUMENT

It is the position of the State of Alabama that the question presented for review in this case is whether the petitioner was denied due process of law by virtue of the fact that the prosecutor was allowed to question an accomplice as a witness for the State at petitioner's trial concerning the contents of a written statement made by the accomplice to law enforcement officers. There is nothing in the record to indicate that the prosecutor knowingly called the accomplice to the stand to secure from him a refusal to testify or to use his presence on the stand as a pretense for reading to the jury a statement which was inadmissible against the petitioner (See page 2 of petitioner brief). The record in this case does show that the prosecutor vigorously tried the petitioner.

The State prosecuting attorney may, without depriving the accused of due process of law, question an accomplice concerning the contents of a statement made by the accomplice to law enforcement officers after the witness has been declared hostile by the court.

In this case, Loyd, an accomplice, was found guilty the day before petitioner was put to trial. He was called as a witness against the petitioner. After answering preliminary

questions, some straightforwardly, and others by stating "Not to my knowledge" or "I am not sure," Loyd was confronted with his written statement and was asked twenty-one questions concerning the contents of said statement. These questions covered the entire statement. Loyd refused to answer any of these questions invoking his privilege against self incrimination. See *Ex parte Loyd*, (Ala.) 155 So. 2d 519.

As was held by the Court of Appeals of Alabama in this case, it is within the discretion of the trial court to allow a party to refresh the memory of a hostile witness by calling his attention to a prior statement. *Glenn v. State*, 157 Ala. 12, 47 So. 1034; and *Woodard v. State*, 253 Ala. 259, 44 So. 2d 241.

Under Alabama procedure counsel may not state in the presence of the jury that a witness made a previous inconsistent statement. However, a party for the purpose of showing his surprise or of refreshing the recollection of his witness may ask the witness whether he made a certain statement on a prior occasion. While it is decidedly improper for an attorney to declare that a witness made a prior statement, it is not improper to ask the witness whether he made such statement.

Since Loyd's privilege against self incrimination was personal the petitioner had no right to invoke such privilege. *Namet v. United States*, 373 U. S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278. Cf. *Beck v. Washington*, 369 U. S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98. If Loyd had chosen to answer the prosecutor's questions, the petitioner would have been confronted with testimony legal to use against him.

A witness who has been convicted of a crime arising out of the transaction in question may no longer claim the privilege against self incrimination and may be compelled to

testify. *United States v. Cioffi*, 242 Fed. 2d 472; *United States v. Romero*, 249 Fed. 2d 371; and *United States v. Gernie*, 252 Fed. 2d 664, cert. denied, 356 U. S. 968, 78 S. Ct. 1006, 2 L. Ed. 2d 1073.

The petitioner in this case suggests that the prosecuting attorney knowingly called Loyd to the stand for the purpose of wringing from him a refusal to testify. It is respectfully submitted that the record in this case does not justify petitioner's position. It is common knowledge among both defense and prosecuting attorneys that it is impossible to predict the testimony of convicted accomplices. There have been many instances in which such a witness has refused to testify until after he is called to the stand and then changed his mind. In these instances many an accomplice have provided the jury with the true facts out of which the case arose.

It should here be pointed out that the attorney representing the petitioner and Loyd, at the time of the trial of the case at bar, while objecting to the use of Loyd's statement prior to the examination of the witness, did not object to the questions propounded to Loyd concerning the contents of said statement. After Loyd refused to answer all twenty-one questions said attorney moved the trial court to allow Loyd to purge himself of possible contempt.

After Loyd left the witness chair the State examined two local law enforcement officers and an agent for the Federal Bureau of Investigation without objection. These witnesses testified that Loyd gave the statement, used by the prosecuting attorney, in their presence on January 20, 1962. The State did not attempt to introduce said statement into evidence at the petitioner's trial.

In this state of the record, we respectfully submit that

there was no denial of petitioner's right to due process of law. Error cannot be predicated upon adverse rulings of the trial court where the specific grounds of objections are not apt, unless the evidence sought is inadmissible for any purpose. *Ellis v. State*, 38 Ala. App. 379, 86 So. 2d 842; *Pope v. State*, 39 Ala. App. 42, 96 So. 2d 441; *Robinson v. State*, 40 Ala. App. 101, 108 So. 2d 188; and *Nichols v. State*, 267 Ala. 217, 100 So. 2d 750.

Where the affirmance of a conviction in a state court is rested upon an adequate ground under state procedure, this Honorable Court has held that no question of the denial of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States is presented. *Edelman v. California*, 344 U. S. 357, 73 S. Ct. 293, 97 L. Ed. 387. Cf. *Hedgebeth v. North Carolina*, 344 U. S. 806, 68 S. Ct. 1185, 92 L. Ed. 1739.

This Honorable Court has held that a state may regulate the procedure of its courts in accordance with its own concept of policy and fairness, unless it offends some principle of justice ranked as fundamental.

This Honorable Court has also held that the privilege against self incrimination is not inherent in the right to a fair trial and is, therefore, not protected by the due process clause of the Fourteenth Amendment to the Constitution of the United States. *Adamson v. California*, 232 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903.

For the above reasons, we respectfully submit that no principle of fundamental justice was offended by the rulings of the trial court in the instant case. We submit that the State of Alabama may examine a convicted accomplice concerning

the contents of a prior written statement made by him without violating the due process clause of the Fourteenth Amendment to the Constitution of the United States.

VII

CONCLUSION

Premises considered, we respectfully submit that there is no denial of the petitioner's right to due process of law in this case. Therefore, this case should be affirmed.

Respectfully submitted,

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CERTIFICATE

I, Paul T. Gish, Jr., one of the attorneys for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of January 1965, I served a copy of the foregoing brief and argument, on one of the attorneys for the petitioner, by mailing a copy in a duly addressed envelope, to said attorney of record as follows:

To: Honorable Charles Cleveland
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